80-6298

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IN THE

SUPREME COURT OF THE UNITED STATES

MARCH TERM, 1981

NO.

Lois Mae Mills, Appellant

v.

Dan Habluetzel, Appellee

ON APPEAL FROM THE COURT OF CIVIL APPEALS

OF TEXAS

JURISDICTIONAL STATEMENT

MARCH, 1981

Michael S. Mankins

Counsel for Appellant

COASTAL BEND LEGAL SERVICES
117 W. Sinton
Sinton, Texas 78387

AC 512 364 3805

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IN THE

SUPREME COURT OF THE UNITED STATES

MARCH TERM, 1981

NO.

Lois Mae Mills, Appellant

v.

Dan Habluetzel, Appellee

ON APPEAL FROM THE COURT OF CIVIL APPEALS OF TEXAS

JURISDICTIONAL STATEMENT

Lois Mae Mills, the appellant, appeals from the final judgment of the Court of Civil Appeals of Texas dated January 31, 1980, affirming the Order of Dismissal of the trial court rendered on April 4, 1979. A timely application for a Writ of Error to the Supreme Court of Texas was "Refused. No Reversible Error," on July 16, 1980, and a timely Motion for Rehearing was overruled on December 10, 1980. The Court of Civil Appeals holding was that Section 13.01 of the Texas Family Code, a one year statute of limitation for initiating a paternity suit, is constitutional under the Constitution of the United States, and therefore does not deprive an illegitimate child of equal protection and due process guaranteed by the Fourteenth Amendment.

OPINIONS BELOW

The opinion of the Court of Civil Appeals, Thirteenth

Judicial District of Texas, appears in the appendix hereto, p. 5, 6 & 7 infra, a copy of the clerk's letter which states that the trial court was affirmed is contained in the appendix hereto, p. 4 infra.

No opinion was rendered by the Supreme Court of Texas in the course of refusing the Application for Writ of Error. A copy of the notice of refusal of the Application for Writ of Error is contained in the appendix, p. 15 infra. The Supreme Court of Texas overruled the Motion for Rehearing on December 10, 1980. A copy of the notice of the overruling of the Motion for Rehearing is contained in the appendix hereto, p. 16 infra.

The Order of Dismissal, District Court of San Patricio County, One Hundred Fifty-sixth Judicial District of Texas, signed April 4, 1979, a copy is contained in the appendix hereto, p. 1 infra.

JURISDICTION

The refusal of appellant's Motion for Rehearing by the Supreme Court of Texas on December 10, 1980, forever denies appellant the right to sue for paternal child support making the judgment of the Court of Civil Appeals reviewable as a final judgment.

A notice of appeal to this Court was duly filed in the Court of Civil Appeals, Thirteenth Supreme Judicial District of Texas, and in the Supreme Court of Texas. See p. 17 infra.

This appeal is being docketed in this Court within 90 days from the overruling of the Motion for Rehearing in The Supreme Court of Texas. The jurisdiction of this

Court is invoked under 28 U.S.C. § 1257 (2).

QUESTION PRESENTED

Whether Section 13.01 of the Texas Family Code violates the Fourteenth Amendment of the Constitution of the United States by creating an illegitimacy classification that denies the appellant, an illegitimate child, the right to sue for paternal child support while imposing no such restriction on legitimate children, similarly situated, and without bearing relationship to an important state interest.

CONSTITUTIONAL PROVISIONS AND STATUTES

Fourteenth Amendment, United States Constitution:

. . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws . . .

Texas Family Code § 13.01 (Vernon 1975):

Section 13.01. Time Limitation of Suit.

A suit to establish the parent-child relationship between a child who is not the legitimate child of a man and the child's natural father by proof of paternity must be brought before the child is one year old, or the suit is barred.

Texas Family Code § 14.05 (a) (b) Texas Revised Civil Statutes (1979)

Section 14.05. Support of Child.

(a) The court may order either or both parents to make

periodic payments or a lump-sum payment, or both, for the support of the child until he is 18 years of age in the manner and to the persons specified by the court in the decree. In addition, the court may order a parent obligated to support a child to set aside property to be administered for the support of the child in the manner and by the persons specified by the court in the decree.

(b) If the court finds that the child, whether institutionalized or not, requires continuous care and personal supervision because of a mental or physical disability and will not be able to support himself, the court may order that payments for the support of the child shall be continued after the 18th birthday and extended for an indefinite period.

Texas Revised Civil Statutes, Annotated. Article 5535.

Art. 5535. [5708] [3373] [3222] Person under disability

If a person entitled to bring any action mentioned in this subdivision of this title be at the time the cause of action accrues either a minor, a married person under twenty-one years of age, a person imprisoned or a person of unsound mind, the time of such disability shall not be deemed a portion of the time limited for the commencement of the action and such person shall have the same time after the removal of his disability that is allowed to others by the provisions of this title.

Amended by Acts 1967, 60th Leg., p. 740, ch. 309, § 3, eff. Jan. 1, 1968.

RAISING THE FEDERAL QUESTION

At the earliest stage possible, the appellant raised

the claim, in an objection to a motion to dismiss in the trial court, that Section 13.01 of the Texas Family Code violates the Constitutional rights of illegitimate children in that such statutes violates those rights set out in the U.S. Constitution by the 14th Amendment: The trial court dismissed appellant's original petition to establish paternity despite appellant's claims, p. 1 infra.

The Fourteenth Amendment claim was reiterated by appellant before the Court of Civil Appeals on Appeal. The Court's opinion states: "We have addressed these issues and found them meritless in the Hernandez case, above mentioned, a companion case to the case at bar. Based on the reasoning set forth in Hernandez, we overrule points of error 1 through 3." p. 7 infra. The opinion of the Hernandez case is contained in the appendix hereto, p. 9, 10, 11, 12, 13 & 14 infra. In Hernandez, the Court said: "Section 13.01 is not unconstitutional. We overrule the points of error dealing with alleged violations of equal protection and due process." p.12 infra. It thus considered and expressly rejected this federal constitutional claim.

The refusal by the Supreme Court of Texas of the Application for Writ of Error noting "No Reversible Error" indicated that the Court was of the opinion that the application presented no error which required reversal.

STATEMENT OF THE CASE

Lois Mae Mills, and the Texas Department of Human Resources filed a suit affecting the parent-child relationship in the interest of Archie Burton Duncan, a child. Dan Habluetzel was named as Respondent. The purpose of the suit was to establish the parent-child relationship between Archie Burton Duncan and Dan Habluetzel and to obtain child support for the

child.

Suit was filed in the 156th Judicial District Court, Sinton, Texas, on October 6, 1978. On the date of filing, Archie Burton Duncan was one year and one month old. Dan Habluetzel, in due time, filed his written answer and pled the limitation of § 13.01, Texas Family Code. Appellee also filed a Motion for Dismissal on the same day.

The Honorable Rachel Littlejohn, Judge Presiding, sustained Appellee's plea in bar and entered a dismissal against Appellant. See appendix hereto, p. 1 infra.

THE QUESTION IS SUBSTANTIAL

The question as to whether a one year statute of limitation on paternity actions invidiously discriminates against illegitimate children so as to deny them the due process and equal protection due under the Fourteenth Amendment is a novel and substantial one. It has never been written on by this Court. However, the fact that there are potential constitutional problems which exist with a statute of limitations on paternity actions appeared to be acknowledged by this Court in footnote 5 to the decision in Lalli v Lalli, 439 U.S.259 (1978). In that footnote, the Court noted that the constitutionality of New York's two year statute of limitations was not before the Court in that case because the New York Court of Appeals had not passed on it. Further the Court noted several times in the case of United States v Clark, 100 S. Ct. 895 (1980), that imposing legal restrictions on illegitimate children which are not equally applicable to legitimate children raises serious equal protection problems and is open to constitutional question.

The classification created by the statute in question

is unconstitutional because it is based on illegitimacy and does not bear an evident and substantial relation to the particular interests the statute is designed to serve. The denial of equal protection by Section 13.01 of the Texas Family Code manifests itself in two ways. First, the statute prevents an illegitimate child over one year of age from being able to obtain child support from his natural father. This right is available to legitimate children in Texas. The failure of the state to provide equal access to support on behalf of both legitimate and illegitimate children violates this Court's holding in Gomez v Perez, 409 U.S.535 (1973). The second violation is the fact that the one year statute of limitations on paternity actions is the only statute of limitation applicable to civil action on behalf of children which is not tolled during the minority of the child. The failure to provide an illegitimate child with a meaningful opportunity to have his paternity judicially established violates this Court's rule, "that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." Boddie v Connecticut, 401 U.S.371, 377 (1971).

The Texas courts in upholding Section 13.01, Texas Family Code as constitutional have stated that the prevention of stale or fraudulent claims is in the state's interest. These same courts have never explained why all other civil statutes of limitation which are tolled during minority except the statute of limitation on paternity actions don't have the problem of stale or fraudulent claims. This Court has several times held that the blanket and conclusive

exclusion of a certain class of illegitimates was not reasonably related to the prevention of spurious claims or prevention of fraud. Jimenez v Weinberger, 417 U.S. 628 (1974), United States v Clark, 100 S. CT. 895 (1980).

Numerous times this Court has struck down statutes which discriminated against illegitimates declaring that the statutes violated the equal protection clause. In Levy v Louisiana, 391 U.S.68 (1968) and Glona v American Guarantee and Liability Insurance Co., 391 U.S.73 (1968), the Court dealt with wrongful death statutes regarding illegitimates and their mothers. In Webes v Aetna Casualty & Surety Co., 406 U.S.164 (1972), discriminatory workmen's compensation statutes were dealt with. Gomez v Perez, 409 U.S.535 (1973) declared that illegitimates had an equal right to child support and other benefits accorded children generally. Jimenez v Weinberger, 417 U.S.628 (1974) held that blanket Social Security Act exclusions of illegitimates was not reasonably related to the prevention of spurious claims. Trimble v Gordon, 430 U.S.762 (1977) held that intestate succession laws which treated legitimate and illegitimate children differently violated the equal protection clause.

Even in the instances where this Court has upheld state and federal law which had differing treatment of legitimate and illegitimates, this Court has done so with the presumption that the illegitimate children could have legally established their paternity within the lifetime of their alleged fathers. Mathews v Lucas, 427 U.S. 495 (1976) upheld a Social Security Act requirement which required a showing of dependency by illegitimates as well as proof of paternity. In Lalli v Lalli, 439 U.S.259 (1978), the Court upheld a state statute requiring that paternity be judicially established during the lifetime

of the father in order for an illegitimate child to inherit from the father by intestate succession.

This Court has also held that fathers of illegitimate children also have protected interests in the custody and upbringing of their children which cannot be automatically disregarded merely because the children are illegitimate. Stanley v Illinois, 405 U.S.645 (1972), Caban v Mohammed, 99 S. Ct. 1760 (1979). No time limits have been placed on the exercise of these priviledges by the fathers of illegitimate children. However, by failing to strike down the Texas one year statute this Court will in effect have given these fathers rights without a corresponding duty to care for or support their children once the children have attained the age of one year without filing a paternity action.

This Court has previously accorded numerous rights to illegitimate children with regards to their relationship to their natural fathers. These rights are currently meaningless to a substantial class of illegitimate children in Texas by virtue of the one year statute of limitation on paternity actions. The state has yet to set forth a legitimate balancing interest to justify the statute.

The appellant's claim of permanent denial of fundamental rights by a state statute is substantial. The statute discriminates by invidious classification and is not reasonably related to any state interests.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

MICHAEL S. MANKINS

COASTAL BEND LEGAL SERVICES
117 W. Sinton, Sinton, Texas 78387
AC 512 364 3805

6 March 1981

APPENDIX

NO. 20267

IN THE INTEREST OF	§	IN THE DISTRICT COURT OF
	§	
ARCHIE BURTON DUNCAN,	§	SAN PATRICIO COUNTY, TEXAS
	§	
A MINOR CHILD	§	156TH JUDICIAL DISTRICT

ORDER OF DISMISSAL

BE IT REMEMBERED, that on the 16th day of March, 1979, came on to be heard Respondent's and Movant's, DAN HABLUETZEL, plea in abatement and motion to dismiss, and came Petitioner by and through its attorney of record and came Respondent, in person and by his attorney.

It appearing that Petitioner having judicially admitted in its petition that the child the subject of this suit was born on February 12, 1977, and it appearing of record that this suit was filed on October 6, 1978, and after hearing testimony and arguments of counsel, it is the opinion of the Court that Respondent-Movant's plea in abatement and special exception, citing Section 13.01 of the Texas Family Code as the statute of limitation barring the filing of this suit, is well taken, and Petitioner having in open Court having admitted same, in that this suit is brought after the child has attained the age of one (1) year, and that there are, therefore, no issues in dispute,

IT IS THEREFORE, ORDERED, ADJUDGED and DECREED that said Cause herein filed be in all things DISMISSED, with prejudice.

[illegible] Petitioner, for which let

1

App. 1

ITERED:
lume 48-A Page 131+132

11

APPROVED AS TO FORM:

RICHARD D. HATCH
County Attorney
San Patricio County, Texas
Room 102
San Patricio County Courthouse
Sinton, Texas

ATTORNEY FOR PETITIONER

APPROVED AS TO FORM
AND SUBSTANCE:

N. F. JACKSON, JR.
BONNER & JACKSON
Attorneys At Law
P. O. Drawer 908
Rockport, Texas 78382
512-729-2353

ATTORNEYS FOR RESPONDENT

PAUL W. NYE
CHIEF JUSTICE
GERALD T. BISSETT
ASSOCIATE JUSTICE
HORACE S. YOUNG
ASSOCIATE JUSTICE

Court of Civil Appeals

Thirteenth Supreme Judicial District

TENTH FLOOR
NUECES COUNTY COURTHOUSE
CORPUS CHRISTI, TEXAS 78401

PAULA K. KUTCHINSKI
CLERK
RUTH G. GIBSON
DEPUTY CLERK
512-888-0416

December 13, 1980

Honorable Winnie Light
District Clerk of San Patricio County
San Patricio County Courthouse
Sinton, Texas 78387

Re: Cause No. 1547
In the Interest of A.B.D.,
A Minor Child
Tr. Ct. No. 20267

Dear Ms. Light:

The judgment in the above cause was affirmed by this Court on January 31, 1980. The mandate is enclosed.

Costs on appeal were adjudged against appellant, Texas Department of Human Resources, with exception of the filing fee from which they are exempt.

Very truly yours,

Paula K. Kutchinski

Paula K. Kutchinski, Clerk

PKK:rg
cc: Honorable Richard A. Hatch
Honorable Lola L. Pomar

Court of Civil Appeals

Thirteenth Supreme Judicial District,

Corpus Christi, Texas

Below is the JUDGMENT in the numbered cause set out herein to be Filed and Entered in the Minutes of the Court of Civil Appeals, Thirteenth Supreme Judicial District of Texas, at Corpus Christi, as of the 31st day of January, 19 80. If this Judgment does not conform to the opinion handed down by the Court in this cause, any party may file a Motion for Correction of Judgment with the Clerk of this Court.

CAUSE NO. 1547 (Tr. Ct. No. 20267)

IN THE INTEREST OF

A. B. D., A MINOR CHILD

on appeal to this Court from San Patricio County, Texas.

* * * * * * *

JUDGMENT

On appeal from the 156th District Court of San Patricio County from an order of dismissal rendered April 4, 1979. Opinion by Associate Justice Gerald T. Bissett.

This cause was submitted to the Court on September 6, 1979, on oral argument, briefs and transcript of the record. These having been examined and fully considered, it is the opinion of the Court that there was no error in the judgment of the court below and said judgment is hereby AFFIRMED against appellant Texas Department of Human Resources.

Costs of the appeal are adjudged against Texas Department of Human Resources. It is hereby ordered that they pay all costs of the appeal from which they are not exempt by statute. It is further ordered that this decision be certified below for observance.

* * * * * * * * *

Shirley Selz, Clerk

FILED
AT 3:20 M. O' CLOCK
FEB 4 1980
CLERK DISTRICT COURT
SAN PATRICIO COUNTY, TEXAS
By ... Deputy

NUMBER 1547

IN THE COURT OF CIVIL APPEALS

FOR THE THIRTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

SITTING AT CORPUS CHRISTI, TEXAS

* * * * * * * *

IN THE INTEREST OF

A. B. D., A MINOR CHILD

* * * * * * * *

On appeal from the 156th District Court of San Patricio County, Texas

* * * * * * * *

O P I N I O N

The Texas Department of Human Resources [TDHR] sued a man hereinafter referred to as "defendant," alleged to be the biological father of a child, under the provisions of Section 13.01 et seq of the TEX.FAMILY CODE to establish a parent-child relationship between defendant and an illegitimate child whose mother had assigned support rights to TDHR. Defendant filed a "Plea in Abatement" in which he specially excepted to TDHR's petition on the basis that suit was barred by the statute of limitations set forth in TEX.FAMILY CODE, §13.01, which provides that a suit to establish the parent-child relationship between an illegitimate child and the alleged natural father must be brought within one year from the birth of the child. [1/] In its "Order of Dismissal" the trial court granted defendant's "plea in abatement and motion to dismiss" with prejudice on the grounds that, while TDHR had "judicially admitted" that the child was born February 12, 1977, suit was not filed until October 6, 1978. The issues before this Court, except for a procedural point which is raised by TDHR and which we shall address first, are identical to those considered and decided by us this day in Texas Department of Human Resources v. Juan Hernandez, cause number 1546. As in that case, we affirm.

1/ Section 13.01. Time Limitation of Suit

"A suit to establish the parent-child relationship between a child who is not the legitimate child of a man and the child's natural father by proof of paternity must be brought before the child is one year old, or the suit is barred."

By its fourth point of error, TDHR complains of the manner in which the trial court disposed of the case. Specifically, TDHR asserts that, instead of dismissing the lawsuit with prejudice after a preliminary hearing, the trial court should have either allowed TDHR to amend its pleadings or waited for defendant to resort to the summary judgment process. Since the court did neither, TDHR feels that somehow it has been prejudiced and therefore the cause should be reversed. We disagree.

Although defendant's answer to TDHR's original petition is styled a plea in abatement, it is actually a plea in bar. A misnomer of the pleadings is not controlling and the court can look to the substance of the plea and treat it accordingly. Texas Highway Dept. v. Jarrell, 418 S.W.2d 486 (Tex.Sup. 1967); Piper v. Estate of Thompson, 546 S.W.2d 341 (Tex.Civ.App.--Dallas 1976, no writ); Rule 71, T.R.C.P. Defendant's contention that TDHR's suit is barred by limitations is a plea in bar because it goes to plaintiff's right to recover. 2 McDonald, Texas Civil Practice, §7.04(A) (I) (1975); Piper v. Estate of Thompson, 546 S.W.2d 341 (Tex.Civ.App.--Dallas 1976, no writ). A plea in abatement, on the other hand, would set forth some obstacle to further prosecution of the cause until it is removed. Life Ass'n of America v. Good, 71 Tex. 90, 8 S.W. 639 (1888).

A plea in bar by limitations ordinarily is an affirmative defense. Rule 94, T.R.C.P. Where a pleading, however, affirmatively states facts which demonstrate that the suit is barred, an exception may be used to test the pleadings. Hubler v. City of Corpus Christi, 564 S.W.2d 816 (Tex.Civ.App.--Corpus Christi 1978, writ ref'd n.r.e.); Mueller v. Banks, 317 S.W.2d 254 (Tex. Civ.App.--San Antonio 1958, no writ); 1 McDonald, Texas Civil Practice, §7.19 (1971). That is essentially the situation in the case at bar because TDHR's pleadings show on their face that the child was born more than one year before the petition originally was filed. Ordinarily, when the plea involved is, in truth and fact, a plea in abatement, a court which sustains an exception thereto should not dismiss the suit summarily because

plaintiff has the right to amend and plead additional facts, such as circumstances which would avoid the bar of limitations. Acme Color Art Printing Co., Inc. v. Brown, 488 S.W.2d 507 (Tex.Civ.App.--Dallas 1974, writ ref'd n.r.e.). We recognize the general rule that a plea of limitations should not be sustained at a preliminary hearing unless the summary judgment process is used or the parties agree. Kelly v. Bluff Creek Oil Co., 309 S.W.2d 208 (Tex.Sup. 1958); Piper v. Estate of Thompson, 546 S.W.2d 341 (Tex.Civ.App.--Dallas 1976, no writ). In the case at bar, however, there were no additional facts which plaintiff could have pled in order to avoid the bar of limitations because, as the trial court's order of dismissal indicates, TDHR admitted in open court that the original petition had been brought after the child had attained the age of one year. We have, this day, held (Texas Department of Public Resources v. Juan Hernandez) that the one-year statute of limitations provided for by Section 13.01 of the Family Code cannot be tolled by the child's infancy. In this particular case, therefore, we deem it proper to treat the trial court's order of dismissal as a summary judgment that plaintiff take nothing. See Robinson v. Buckner Park, Inc., 547 S.W.2d 60, 61 n. 1 (Tex. Civ.App.--Dallas, 1977, writ ref'd n.r.e.). The fourth point of error is overruled.

By its points of error 1 through 3, TDHR asserts that Section 13.01 of the Family Code is unconstitutional or, in the alternative, that it is tolled by reason of infancy. We have addressed these issues and found them to be meritless in the Hernandez case, above mentioned, a companion case to the case at bar, decided this day. Based upon the reasoning set forth in Hernandez, we overrule points of error 1 through 3. There being no further allegations of reversible error, the order of the trial court dismissing the suit with prejudice is AFFIRMED.

GERALD T. BISSETT
Associate Justice

Opinion delivered and
filed this, the 31st
day of January, 1980.

Court of Civil Appeals

Thirteenth Supreme Judicial District,

Corpus Christi, Texas

Below is the JUDGMENT in the numbered cause set out herein to be Filed and Entered in the Minutes of the Court of Civil Appeals, Thirteenth Supreme Judicial District of Texas, at Corpus Christi, as of the 31s6 day of January, 19 80. If this Judgment does not conform to the opinion handed down by the Court in this cause, any party may file a Motion for Correction of Judgment with the Clerk of this Court.

CAUSE NO. 1546 (Tr. Ct. No. 20610)

TEXAS DEPARTMENT OF HUMAN RESOURCES, Appellant

V.

JUAN HERNANDEZ, Appellee

on appeal to this Court from San Patricio County, Texas

* * * * * * *

JUDGMENT

On appeal from the 36th District Court of San Patricio County from a judgment rendered March 29, 1979. Opinion by Associate Justice Gerald T. Bissett.

This cause was submitted to the Court on September 6, 1979, on oral argument, briefs and transcript of the record. These having been examined and fully considered, it is the opinion of the Court that there was no error in the judgment of the court below and said judgment is hereby AFFIRMED against appellant Texas Department of Human Resources.

Costs of the appeal are adjudged against Texas Department of Human Resources. It is hereby ordered that they pay all costs of the appeal from which they are not exempt by statute. It is further ordered that this decision be certified below for observance.

* * * * * * * *

Shirley Selz, Clerk

NUMBER 1546

IN THE COURT OF CIVIL APPEALS

FOR THE THIRTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

SITTING AT CORPUS CHRISTI, TEXAS

* * * * * * *

TEXAS DEPARTMENT OF HUMAN RESOURCES, Appellant,

V.

JUAN HERNANDEZ, Appellee.

* * * * * * *

On appeal from the 36th District Court of San Patricio County, Texas.

* * * * * * *

O P I N I O N

The Texas Department of Human Resources [TDHR] sued Juan Hernandez [defendant] under the provisions of Section 13.01 et seq of the Texas Family Code to establish a parent-child relationship between defendant and an illegitimate child whose mother had assigned support rights to TDHR. 1/ Defendant filed a motion for summary judgment asserting that the suit was barred by the statute of limitations set forth in Section 13.01 of the Texas Family Code, which provides that a suit to establish the parent-child relationship between an illegitimate child and the alleged natural father must be brought within one year from the birth of the child. 2/ The trial court granted the motion for summary judgment, it being undisputed that, while the child was born March 30, 1976, suit was not filed until March 6, 1979. We affirm.

1/ This suit is distinguishable from a bastardy, or filiation, suit. While the successful prosecution of a suit to establish the parent-child relationship pursuant to Section 13.01 et seq of the Family Code would entail legitimation of the child, TEX.FAMILY CODE ANN. §§12.02(c), 13.09 (1975) (Supp. 1980), filiation would not necessarily import legitimacy. See Rodrigues v. Rodrigues, 190 N.E. 20 (Mass. 1934); Waddell v. State, 357 S.W.2d 651 (Ark. 1962).

2/ Section 13.01. Time Limitation of Suit

"A suit to establish the parent-child relationship between a child who is not the legitimate child of a man and the child's natural father by proof of paternity must be brought before the child is one year old, or the suit is barred." TEX.FAMILY CODE ANN. §13.01 (Supp. 1980).

Disposition of this cause requires us briefly to review the history of paternity suits, and support rights of illegitimate children in the State of Texas. Prior to January 17, 1973, the law in Texas imposed duties on fathers to support legitimate children but denied that right to illegitimates. Compare Gully v. Gully, 231 S.W.97 (Tex.Sup. 1921) with Home of the Holy Infancy v. Kaska, 397 S.W.2d 208 (Tex.Sup. 1966). This law was invalidated upon constitutional grounds by the United States Supreme Court on January 17, 1973, in Gomez v. Perez, 409 U. S. 535, 93 S. Ct. 872, 35 L.E.C. 2d 56 (1973). In Gomez the court concluded that Texas law violated the constitutional guarantee of equal protection, stating:

> "Once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers, there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother." (409 U. S. at 538)

Implicit in the Gomez decision was the notion that an illegitimate has a common law right to institute a proceeding for the purpose of showing that the alleged father is the biological father as a necessary requisite to establish a judicially enforceable right otherwise accorded to legitimate children generally. Wynn v. Wynn, 587 S.W.2d 790 (Tex.Civ.App.--Corpus Christi 1979, no writ).

After Gomez the legislature enacted Title 2 of the Family Code governing the parent-child relationship. Tex. Laws 1973, ch. 543 at 1411. Understandably, in drafting Title 2, the legislature considered comprehensive provisions regulating the legal aspects of children born out of wedlock. Despite the Gomez decision, however, such comprehensive provisions were not passed. Instead, the legislative "response" to Gomez was found in Chapter 13 of the Family Code which provided for voluntary legitimation proceedings. Smith, Commentary on Title 2 of the Family Code, 5 Tex. Tech. L. Rev. 389, 418 (1974). It was later held, however, that when the legislature provided judicial relief against the father on behalf of a legitimate child for support, due to Gomez it necessarily provided the same relief on behalf

of an illegitimate child. In the Interest of R__ V__ M__, 530 S.W.2d 921 (Tex.Civ.App.--Waco 1975, no writ). Thus, after the effective date of Title 2, which was January 1, 1974, illegitimate children had judicially enforceable support rights, whether by common law or by statute, against their biological fathers. Gomez, supra; Wynn, supra; In the Interest of R__ V__ M__, supra.

Remaining in a state of flux, the statutory rights of illegitimates were brought into sharper focus by amendments to Chapter 13 of Title 2 of the Family Code, the effective date of which was September 1, 1975. The result was the present involuntary legitimation proceeding found in Sections 13.01 through 13.09 of the Family Code. By enacting Section 13.01 et seq of the Family Code, the legislature attempted to provide a practical framework within which the rights of the alleged father as well as the rights of the illegitimate child are protected. Wynn v. Wynn, supra. The United States Supreme Court said in Gomez that there are

> ". . . lurking problems with respect to proof of paternity. Those problems are not to be brushed lightly aside, but neither can they be made into an impenatrable barrier that works to shield otherwise invidious discrimination."

Section 13.01 of the Family Code, which requires that paternity suits be filed at least one year from the birth of the child, first came under judicial scrutiny with regard to the issue of retroactivity. In Alvarado v. Gonzales, 552 S.W.2d 539 (Tex.Civ.App.--Corpus Christi 1977, no writ), this Court held that Section 13.01 was intended to apply only to those suits to establish the parent-child relationship for illegitimate children born after September 1, 1975, the effective date of the statute. We also held that retroactive application of the limitation statute would violate the constitutional rights of illegitimate children born before the statute took effect.

In Alvarado we were not called upon to determine the constitutionality of Section 13.01 as it applies to children

born after the effective date of the statute. This issue did not come before an appellate court until Texas Department of Human Resources v. Chapman, 570 S.W.2d 46 (Tex.Civ.App.--Dallas 1978, writ ref'd n.r.e.). In Chapman the Court held that the statute of limitations for initiating [illegible]rnity suit did not

deprive an illegitimate child of his constitutional rights to due process and equal protection under either the United States Constitution or the Texas Constitution. In reaching its holding, however, the court expressly reserved judgment on whether the various tolling provisions set forth in the Texas Revised Civil Statutes are applicable to extend the period within which a paternity suit may be filed. 570 S.W.2d at 49, n. 3.

The issue of tolling was both considered and decided shortly after Chapman in Texas Department of Human Resources v. Delley, 581 S.W.2d 519 (Tex.Civ.App.--Dallas 1979, writ ref'd n.r.e.). In Delley the Court was faced with a suit brought on behalf of a child born before the effective date of Section 13.01. Finding itself in agreement with this Court's decision in Alvarado, the Court held that Section 13.01 only applies to children born after September 1, 1975. The Court next held that the proper statute of limitations for suits brought on behalf of children born before the effective date of Section 13.01 is the four-year statute of limitations provided in TEX.REV.CIV.STAT.ANN. art. 5529 (1958). Finally, the Delley court held that the four-year statute of limitations is tolled during the minority of the child as a matter of public policy and by virtue of TEX. REV.CIV.STAT.ANN. art. 5535 (Supp. 1978-79), the general tolling statute.

TDHR's points of error on appeal in the case at bar. Present to this Court the issues of whether Section 13.01 is constitutional and, if so, whether it is tolled during the minority of a child born after the effective date of the law. Regarding the constitutionality of Section 13.01, we, as an intermediate appellate court, choose to follow Chapman, since a writ or error was refused "no reversible error" by the Texas Supreme Court. TDHR's constitutional arguments in the case at bar are virtually the same as its arguments made in Chapman. Section 13.01 is not unconstitutional. We overrule the points of error dealing with alleged violations of equal protection and due process.

We next turn to the argument of TDHR that Section 13.01 should be tolled uring the minority of the child. The action at bar was brought by TDHR, pursuant to an assignment to it by

the child's mother of her rights to child support. This assignment was made pursuant to TEX.REV.CIV.STAT.ANN. art. 695c §18-B(c (Supp. 1979). Nevertheless, it is a "suit affecting the parent-child relationship" because the suit was brought under the Family Code to legitimate the child in order to require support by the biological father. TEX.FAMILY CODE ANN. §11.01(5) (1975). It may be brought by "any person with an interest in the child, including the child (through a representative authorized by the court), any agency of the State. . . and any authorized agency." TEX.FAMILY CODE ANN. §11.03 (1975). Since, however, the essential concern in any case is the best interest of the child, TEX. FAMILY CODE ANN. §14.07(a) (1975), we may assume that, although the action at bar was brought by TDHR, the real party in interest is the child. See Texas Dept. of Human Resouces v. Delley, supra.

Although the child is the real party in interest in this action, however, it would be both illogical and unreasonable for this Court to hold that Section 13.01 is tolled on account of minority. The purpose of this lawsuit is to establish the duty of the biological father to support a child fathered by him and born out of wedlock. Tolling the statute of limitations would simply allow the child to bring suit for child support once he is no longer a child. Furthermore, tolling the statute of limitations would but constitute a disingenuous way of holding Section 13.01 unconstitutional, a conclusion we are not willing to reach in light of the Supreme Court's decision to refuse a writ of error in Chapman for want of reversible error. Moreover, we note that Section 13.01 is an integral part of the same statutory scheme which created the involuntary legitimation proceeding. Where a statute creates a right and also incorporates a limitation upon the time within which the suit is to be brought, the limitation qualifies the right so that it becomes a part of the substantive

law rather than the procedural law. Franco v. Allstate Ins. Co., 505 S.W.2d 789 (Tex.Sup. 1974); Francis v. Herrin Trans. Co., 432 S.W.2d 710 (Tex.Sup. 1968); State of California v. Copus, 309 S.W.2d 227 (Tex.Sup. 1958). Thus, it would be highly improper for this Court to toll, and in effect, emasculate, what is obviously a substantive part of Chapter 13 of the Family Code. TDHR's last point of error, therefore, is overruled.

There is a vast difference between the duties imposed upon a biological father of an illegitimate child and the rights acquired by the child in a successful suit for legitimation, and those duties imposed and rights acquired in a suit for child support only. The points of error before us in this appeal relate solely to Chapter 13 of the Family Code, although, arguendo, the child may have a common law right for support because, when the legislature provided a judicial right against the biological father on behalf of a legitimate child for support [TEX.FAMILY CODE ANN. §§ 4.02, 12.04 and 14.05 (1975 and 1980 Supp.], it necessarily provided the same relief on behalf of an illegitimate child. See Wynn v. Wynn, supra; In the Interest of R__ V__ M__, supra. The only difference is that the illegitimate child must first prove biological fatherhood.

We cannot decide this case on legal theories which are not asserted by the appellant, are not based upon proper pleadings and are not before this Court on proper points of error. Therefore, insofar as this appeal is concerned, it is immaterial whether a common law cause of action for child support which stops short of actual legitimation exists on behalf of an illegitimate child. That issue was not before the trial court, is not before us, and we express no opinion thereon.

The judgment of the trial court is AFFIRMED.

GERALD T. BISSETT
Associate Justice

Opinion delivered and
filed this, the 31st
day of January, 1980.

CLERK'S OFFICE - SUPREME COURT

Austin, Texas July 16, 1980

Dear Sir:

You are hereby notified that the Application for Writ of Error in the case of IN THE INTEREST OF A.B.D., NO. B-9337

was this day refused. No reversible error.

Very truly yours,
GARSON R. JACKSON, Clerk

CLERK'S OFFICE - SUPREME COURT

Dec. 10, 1980.

Austin, Texas,

Dear Sir:

You are hereby notified that the Motion for Rehearing in the case of IN THE INTEREST OF A.B.D., A MINOR CHILD, B-9337,

was this day overruled.

Very truly yours,
GARSON R. JACKSON, Clerk

Office-Supreme Court, U.S.
FILED
JUN 16 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-6298

In the Supreme Court of the United States

OCTOBER TERM, 1980

LOIS MAE MILLS,

Appellant,

v.

DAN HABLUETZEL,

Appellee.

APPEAL FROM THE COURT OF CIVIL APPEALS OF TEXAS

JOINT APPENDIX

MICHAEL S. MANKINS
Coastal Bend Legal Services
117 W. Sinton
Sinton, Texas 78387
(512) 364-3805
Counsel for Appellant

JOHN H. FLINN
P.O. Box 1112
Sinton, Texas 78387
(512) 364-4721
Counsel for Appellee

APPEAL DOCKETED MARCH 7, 1981.
PROBABLE JURISDICTION NOTED APRIL 27, 1981.

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

October 6, 1978, Petitioners' Lois Mae Mills and the Texas Department of Human Resources original petition, filed in the 156th Judicial District Court of San Patricio County, Texas.

October 16, 1978, Respondent, Dan Habluetzel's original answer filed.

April 4, 1979, Order dismissing Petitioner's Original Petition signed by Judge Rachel Littlejohn of the 156th Judicial District Court.

March 19, 1979, Appellants' Lois Mae Mills and the Texas Department of Human Resources notice of appeal to the Texas 13th Court of Civil Appeals filed.

July 19, 1979, Appellee, Dan Habluetzel's Motion to Change the Style of the Case to In the Interest of A.B.D., a child.

January 31, 1980, the 13th Court of Civil Appeals enters Judgment affirming the dismissal of Petitioner's Original Petition.

April 18, 1980, Appellants, Lois Mae Mills and the Texas Department of Human Resources, filed their Application for Writ of Error in the Texas Supreme Court.

April 28, 1980, Appellee, Dan Habluetzel, filed his reply to Appellants' Application for Writ of Error.

July 16, 1980, the Supreme Court of Texas refuses to consider Appellants' Lois Mae Mills and the Texas Department of Human Resources Writ of Error.

December 10, 1980, the Supreme Court of Texas overrules Appellant's Lois Mae Mills, Application for Rehearing.

IN THE DISTRICT COURT OF
SAN PATRICIO COUNTY, TEXAS
156TH JUDICIAL DISTRICT

No. 20267

IN THE INTEREST OF
ARCHIE BURTON DUNCAN,
MINOR CHILD

ORIGINAL PETITION TO ESTABLISH THE PARENT-CHILD RELATIONSHIP

Filed October 6, 1978

This suit is brought by the County Attorney of San Patricio County, Texas, for the Texas Department of Human Resources pursuant to the terms of a contract between the Texas Department of Human Resources and San Patricio County, Texas and by Lois Mae Duncan Mills.

I.

No other Court has continuing jurisdiction of the child who is the subject of this suit.

II.

The following child the subject of this suit, is not the legitimate child of any man, Archie Burton Duncan, a male child born February 12, 1977.

III.

Support rights for the above-named child have been assigned to the Texas Department of Human Resources pursuant to TEX. REV. STAT. art. 695c, Section 18-B.

IV.

The mother of the child is Lois Mae Duncan Mills, who was born on October 11, 1956 and who resides at Rt. 1 Box 521, Ingleside, Texas 78362.

V.

Petitioners allege that Dan Hobluetzel whose age is — and who resides at 1526 S. Main, Ingleside, Texas 78362, hereinafter called Respondent, is the biological father of the child who is the subject of this suit.

Process should be served at that address or at the Respondent's regular place of business which is ———.

VI.

There are no court-ordered conservatorships, guardianships, or other court-ordered relationships affecting the child who is the subject of this suit.

VII.

No property of value is owned or possessed by the child.

VIII.

The purpose of this suit is to establish the parent-child relationship between the father of the child who is the subject of this suit and such child by establishing that the Respondent is the biological father of such child and by obtaining a final court decree to such effect, together with such other and further orders and relief as would follow such determination under the Texas Family Code, all of which are requested.

IX.

The best interest of the child—the subject of this suit will be served by appointment of the mother as managing conservator and Petitioners so request.

X.

The mother of the child is without sufficient financial resources to provide support for the minor child.

XI.

The Texas Department of Human Resources is currently providing $110.00 per month in public assistance payments for the support of the child and has been providing since August, 1978.

XII.

Petitioners request the Court to appoint a guardian ad litem to represent the interest of the child—the subject of this suit.

XIII.

Respondent is financially able to contribute for the support and maintenance of the minor child in such amounts and at such times this Court may determine to be just and proper.

XIV.

Petitioners request the Court, after appearance of Respondent to order the mother, the father, and the child to submit to blood tests and to prescribe the arrangements for the tests.

Petitioners request that, after completion of the blood tests, the Court Orders all parties to appear in person or by counsel at a pre-trial conference to hear the oral testimony of depositions concerning such blood tests and findings of the Court appointed examiners and if any qualified examiners of blood tests called by any party.

IV.

It was necessary to secure the services of the County Attorney of San Patricio County, a licensed attorney, to preserve and protect the child's rights. Dan Habluetzel, Respondent, should be ordered to pay a reasonable attorney's fee, and a judgment should be rendered in favor of the County Attorney's office and against Respondent; or, in the alternative, such reasonable attor-

ney's fee should be taxed as costs and be ordered paid directly to the County Attorney's office, all as is provided for in Section 21.39 of the Family Code.

PRAYER

Petitioners pray that citation be issued to all persons entitled to citation under the law.

Petitioners pray that the Court enter judgment establishing paternity of the alleged father in accordance with the purpose of the suit as above set forth that the mother be appointed managing conservator that any other relief requested be given, and for attorney's fees, cost and general and specific relief as the Court deems proper.

Petitioners pray further that any payments ordered to be made by the Respondent for the support and maintenance of his minor child be ordered paid, by money order or cashier's check payable to the Texas Department of Human Resources and mailed to the District Clerk, P.O. Box 1084, Sinton, Texas 78387 and said Clerk shall forward such payments to said Department, to the extent that the Department has supplied the needs of said child and for as long as the Department continues to provide support for the said child, provided further that in the event that said Department discontinues making payments for the benefits of the named child said Department shall notify the said Registry in writing of such discontinuance and thereafter all such payments received under this Order shall be paid over to: Lois Mae Duncan Mills, Rt. 1 Box 521, Ingleside, Texas 78362.

TEXAS DEPARTMENT OF
HUMAN RESOURCES

By: /s/ Richard D. Hatch
RICHARD D. HATCH,
County Attorney of
San Patricio County, Texas
Room 102—Courthouse,
Sinton, Texas
Attorney for Petitioner
Pursuant to Contract
between Texas Department
of Human Resources and
San Patricio County, Texas

/s/ Lois Mae Duncan Mills
Petitioner

STATE OF TEXAS
COUNTY OF SAN PATRICIO

Lois Mae Duncan Mills, being duly sworn, deposes and says: That she is a Petitioner herein and that she has read the foregoing petition and knows the contents thereof and that the same is true.

/s/ Lois Mae Duncan Mills
Petitioner

SWORN TO AND SUBSCRIBED before me this the 5th day of October, 1978.

[SEAL]

/s/ Patsy Martinez
Notary Public in and for
San Patricio County, Texas

Name and Address of
Notary Public
Patsy Martinez
Taft, Texas 78390
My commission expires:
May 10, 1980

IN THE DISTRICT COURT OF
SAN PATRICIO COUNTY, TEXAS
156TH JUDICIAL DISTRICT

No. 20267

IN THE INTEREST OF
ARCHIE BURTON DUNCAN,
A MINOR CHILD

ANSWER OF RESPONDENT DAN HABLUETZEL

Filed October 16, 1978

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES DAN HABLUETZEL, Respondent in the above entitled and numbered cause and files this his Original Answer and Plea In Abatement and would show the Court as follows:

I.

The Respondent specially excepts to the whole of Petitioner's Original Petition inasmuch as it appears therefrom that Petitioner's action as therein stated accrued more than one (1) year before the date of the filing of this suit; and that the same is barred by limitation, as provided in Section 13.01, Texas Family Code.

WHEREFORE, premises considered, Respondent prays Judgment of this Special Exception and Plea and that he go hence with his costs without day, and that this case be dismissed.

/s/ Lola L. Bonner
LOLA L. BONNER
BONNER & JACKSON
Attorneys At Law
P.O. Drawer 908
Rockport, Texas 78382
Attorneys for Respondent

II.

Answering further, if further answer be needed, Respondent denies all and singular each and every allegation contained in Petitioner's Original Petition and demands strict proof thereof.

WHEREFORE, Premises considered, Respondent prays that Petitioner take nothing by his suit and that he go hence without day with his costs.

/s/ Lola L. Bonner
LOLA L. BONNER

THE STATE OF TEXAS)
)
COUNTY OF ARANSAS)

BEFORE ME, the undersigned authority in and for said County and State, on this day personally appeared LOLA L. BONNER, who, on oath stated that she is the attorney for DAN HABLUETZEL, Respondent herein; that she has authority to make this Affidavit; and that the statements in this Original Answer and Plea In Abatement are true.

/s/ Lola L. Bonner
LOLA L. BONNER

GIVEN UNDER MY HAND AND SEAL OF OFFICE on this the 12th day of October, A.D., 1978.

/s/ Marianne Gould
MARIANNE GOULD
Notary Public in and for
Aransas County, Texas
My Commission Expires: 7-7-79

[SEAL]

IN THE DISTRICT COURT OF
SAN PATRICIO COUNTY, TEXAS
156TH JUDICIAL DISTRICT

No. 20267

IN THE INTEREST OF
ARCHIE BURTON DUNCAN,
A MINOR CHILD

ORDER OF DISMISSAL

BE IT REMEMBERED, that on the 16th day of March, 1979, came on to be heard Respondent's and Movant's, DAN HABLUETZEL, plea in abatement and motion to dismiss, and came Petitioner by and through its attorney of record and came Respondent, in person and by his attorney.

It appearing that Petitioner having judicially admitted in its petition that the child the subject of this suit was born on February 12, 1977, and it appearing of record that this suit was filed on October 6, 1978, and after hearing testimony and arguments of counsel, it is the opinion of the Court that Respondent-Movant's plea in abatement and special exception, citing Section 13.01 of the Texas Family Code as the statute of limitation barring the filing of this suit, is well taken, and Petitioner having in open Court having admitted same, in that this suit is brought after the child has attained the age of one (1) year, and that there are, therefore, no issues in dispute,

IT IS THEREFORE, ORDERED, ADJUDGED and DECREED that said Cause herein filed be in all things DISMISSED, with prejudice.

Costs ADJUDGED against Petitioner, for which let exception issue.

Signed this 4th day of April 1979.

/s/ Rachel Littlejohn
RACHEL LITTLEJOHN
Judge
156th Judicial District
San Patricio County, Texas

IN THE DISTRICT COURT OF
SAN PATRICIO COUNTY, TEXAS
156TH JUDICIAL DISTRICT

No. 20267

IN THE INTEREST OF
ARCHIE BURTON DUNCAN,
A MINOR CHILD

NOTICE OF APPEAL

Filed March 19, 1979

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes the Texas Department of Human Resources by the County Attorney of San Patricio County, Texas, and gives notice that it excepts to the dismissal of this suit on March 16, 1979, and gives notice that it desires to appeal to the Court of Civil Appeals, sitting at Corpus Christi, Texas, from the said dismissal.

/s/ Richard D. Hatch
RICHARD D. HATCH
County Attorney

Certificate of Service (omitted in printing)

IN THE COURT OF CIVIL APPEALS FOR THE
SUPREME JUDICIAL DISTRICT OF TEXAS
Corpus Christi, Texas

No. 1547

TEXAS DEPARTMENT OF HUMAN RESOURCES, APPELLANT

vs.

DAN HABLUETZEL, APPELLEE

MOTION TO CHANGE STYLE OF CAUSE

TO THE HONORABLE COURT OF CIVIL APPEALS:

Now comes DAN HABLUETZEL, Appellee in the above cause and moves the Court to change the style of this cause thereby returning to the style which it assumed and retained throughout the lower Court proceedings and would show the Court as follows:

I.

The case was filed October 6, 1978, in the 156th Judicial District Court of San Patricio County, Texas, and was styled "In The Interest Of Archie Burton Duncan, Minor Child", a style which was used throughout the proceedings including the Order of Dismissal signed by the Honorable Rachel Littlejohn, Judge of Said Court.

II.

That upon transmittal to this Honorable Court for appeal, the style was changed to the Department of Hu-

man Resources vs. Dan Habluetzel, which style is prejudicial to Appellee, inasmuch as no determination of paternity has been made.

WHEREFORE premises considered, Appellee prays judgment of this Motion and that the Clerk of this Honorable Court be directed to continue the style by which the case was known to the 156th Judicial District Court.

Respectfully submitted,

LOLA L. BONNER
Attorney at Law
P.O. Drawer 908
Rockport, Texas 78382

COURT OF CIVIL APPEALS
THIRTEENTH SUPREME JUDICIAL DISTRICT
Tenth Floor
Nueces County Courthouse
Corpus Christi, Texas 78401

January 31, 1980

Mr. Richard D. Hatch
County Attorney
San Patricio County Courthouse
Sinton, Texas 78387

Mr. John H. Flinn
Attorney at Law
P.O. Box 1112
Sinton, Texas 78387

Ms. Lola L. Bonner
Bonner & Jackson
Attorneys at Law
P.O. Drawer 908
Rockport, Texas 78382

Re: Cause No. 1546 (Tr. Ct. No. 20610)
Texas Department of Human Resources
v.
Juan Hernandez

Cause No. 1547 (Tr. Ct. No. 20267)
Texas Department of Human Resources
v.
Dan Habluetzel

Dear Attorneys:

The Court affirmed the judgments of the trial court in the above two causes today, January 31, 1980. A full opinion discussing all the issues was written in #1546,

which opinion will be published. The opinion in #1547 refers to the companion case for the reasons supporting the judgment, and will not be published. Both opinions and judgments are enclosed.

The Court also ruled on the motions pending in #1547. Appellee's motion to dismiss for want of jurisdiction was denied. The motion to change the style of the case was granted, and the style changed to IN THE INTEREST OF A. B. D.

Very truly yours,

SHIRLEY SELZ
Clerk

SS:cc
Enclosure
cc: Honorable Rachel Littlejohn, District Judge
Honorable Ronald M. Yeager, District Judge
Mrs. Winnie Light, District Clerk

COURT OF CIVIL APPEALS
THIRTEENTH SUPREME JUDICIAL DISTRICT
Corpus Christi, Texas

Below is the JUDGMENT in the numbered cause set out herein to be Filed and Entered in the Minutes of the Court of Civil Appeals, Thirteenth Supreme Judicial District of Texas, at Corpus Christi, as of the 31st day of January, 1980. If this Judgment does not conform to the opinion handed down by the Court in this cause, any party may file a Motion for Correction of Judgment with the Clerk of this Court.

Cause No. 1547 (Tr. Ct. No. 20267)

IN THE INTEREST OF

A. B. D., A MINOR CHILD

On appeal to this Court from
San Patricio County, Texas

JUDGMENT—January 31, 1980

On appeal from the 156th District Court of San Patricio County from an order of dismissal rendered April 4, 1979. Opinion by Associate Justice Gerald T. Bissett.

This cause was submitted to the Court on September 6, 1979, on oral argument, briefs and transcript of the record. These having been examined and fully considered, it is the opinion of the Court that there was no error in the judgment of the court below and said judgment is hereby AFFIRMED against appellant Texas Department of Human Resources.

Costs of the appeal are adjudged against Texas Department of Human Resources. It is hereby ordered that they pay all costs of the appeal from which they are not exempt by statute. It is further ordered that this decision be certified below for observance.

SHIRLEY SELZ
Clerk

IN THE COURT OF CIVIL APPEALS FOR THE THIRTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS SITTING AT CORPUS CHRISTI, TEXAS

Number 1547

IN THE INTEREST OF
A. B. D., A MINOR CHILD

On appeal from the 156th District Court
of San Patricio County, Texas

OPINION—January 31, 1980

The Texas Department of Human Resources [TDHR] sued a man hereinafter referred to as "defendant," alleged to be the biological father of a child, under the provisions of Section 13.01 et seq. of the TEX. FAMILY CODE to establish a parent-child relationship between defendant and an illegitimate child whose mother had assigned support rights to TDHR. Defendant filed a "Plea in Abatement" in which he specially excepted to TDHR's petition on the basis that suit was barred by the statute of limitations set forth in TEX. FAMILY CODE, § 13.01, which provides that a suit to establish the parent-child relationship between an illegitimate child and the alleged natural father must be brought within one year from the birth of the child.[1] In its "Order of Dismissal" the trial court granted defendant's "plea in abatement and motion to dismiss" with prejudice on the

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[1] Section 13.01. Time Limitation of Suit

"A suit to establish the parent-child relationship betwen a child who is not the legitimate child of a man and the child's natural father by proof of paternity must be brought before the child is one year old, or the suit is barred."

grounds that, while TDHR had "judicially admitted" that the child was born February 12, 1977, suit was not filed until October 6, 1978. The issues before this Court, except for a procedural point which is raised by TDHR and which we shall address first, are identical to those considered and decided by us this day in Texas Department of Human Resources v. Juan Hernandez, cause number 1546. As in that case, we affirm.

By its fourth point of error, TDHR complains of the manner in which the trial court disposed of the case. Specifically, TDHR asserts that, instead of dismissing the lawsuit with prejudice after a preliminary hearing, the trial court should have either allowed TDHR to amend its pleadings or waited for defendant to resort to the summary judgment process. Since the court did neither, TDHR feels that somehow it has been prejudiced and therefore the cause should be reversed. We disagree.

Although defendant's answer to TDHR's original petition is styled a plea in abatement, it is actually a plea in bar. A misnomer of the pleadings is not controlling and the court can look to the substance of the plea and treat it accordingly. Texas Highway Dept. v. Jarrell, 418 S.W.2d 486 (Tex. Sup. 1967); Piper v. Estate of Thompson, 546 S.W.2d 341 (Tex. Civ. App.—Dallas 1976, no writ); Rule 71, T.R.C.P. Defendant's contention that TDHR's suit is barred by limitations is a plea in bar because it goes to plaintiff's right to recover. 2 McDonald, Texas Civil Practice, § 7.04(A)(I) (1975); Piper v. Estate of Thompson, 546 S.W.2d 341 (Tex. Civ. App.—Dallas 1976, no writ). A plea in abatement, on the other hand, would set forth some obstacle to further prosecution of the cause until it is removed. Life Ass'n of America v. Good, 71 Tex. 90, 8 S.W. 639 (1888).

A plea in bar by limitations ordinarily is an affirmative defense. Rule 94, T.R.C.P. Where a pleading, however, affirmatively states facts which demonstrate that the suit is barred, an exception may be used to test the pleadings. Hubler v. City of Corpus Christi, 564 S.W.

2d 816 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.); Mueller v. Banks, 317 S.W.2d 254 (Tex. Civ. App.—San Antonio 1958, no writ); 1 McDonald, Texas Civil Practice, § 7.19 (1971). That is essentially the situation in the case at bar because TDHR's pleadings show on their face that the child was born more than one year before the petition originally was filed. Ordinarily, when the plea involved is, in truth and fact, a plea in abatement, a court which sustains an exception thereto should not dismiss the suit summarily because plaintiff has the right to amend and plead additional facts, such as circumstances which would avoid the bar of limitations. Acme Color Art Printing Co., Inc. v. Brown, 488 S.W. 2d 507 (Tex. Civ. App.—Dallas 1974, writ ref'd n.r.e.). We recognize the general rule that a plea of limitations should not be sustained at a preliminary hearing unless the summary judgment process is used or the parties agree. Kelly v. Bluff Creek Oil Co., 309 S.W.2d 208 (Tex. Sup. 1958); Piper v. Estate of Thompson, 546 S.W.2d 341 (Tex. Civ. App.—Dallas 1976, no writ). In the case at bar, however, there were no additional facts which plaintiff could have pled in order to avoid the bar of limitations because, as the trial court's order of dismissal indicates, TDHR admitted in open court that the original petition had been brought after the child had attained the age of one year. We have, this day, held (Texas Department of Public Resources v. Juan Hernandez) that the one-year statute of limitations provided for by Section 13.01 of the Family Code cannot be tolled by the child's infancy. In this particular case, therefore, we deem it proper to treat the trial court's order of dismissal as a summary judgment that plaintiff take nothing. See Robinson v. Buckner Park, Inc., 547 S.W.2d 60, 61 n. 1 (Tex. Civ. App.—Dallas, 1977, writ ref'd n.r.e.). The fourth point of error is overruled.

By its points of error 1 through 3, TDHR asserts that Section 13.01 of the Family Code is unconstitutional or, in the alternative, that it is tolled by reason of infancy.

We have addressed these issues and found them to be meritless in the Hernandez case, above mentioned, a companion case to the case at bar, decided this day. Based upon the reasoning set forth in *Hernandez*, we overrule points of error 1 through 3. There being no further allegations of reversible error, the order of the trial court dismissing the suit with prejudice is AFFIRMED.

GERALD T. BISSETT
Associate Justice

Opinion delivered and
filed this, the 31st
day of January, 1980.

IN THE SUPREME COURT OF TEXAS

No. B-9337

July 16, 1980

IN THE INTEREST OF A.B.D., A MINOR CHILD

From San Patricio County
Thirteenth District

Application of petitioner for writ of error to the Court of Civil Appeals for the Thirteenth Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicant, Texas Department of Human Resources, pay all costs incurred on this application.

No. B-9337

December 10, 1980

IN THE INTEREST OF A.B.D., A MINOR CHILD

From San Patricio County
Thirteenth District

Petitioner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the orders of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand and the seal of the Supreme Court of Texas, at the City of Austin, this, the 11th day of December, 1980.

GARSON R. JACKSON
Clerk

By /s/ Fritzi Born
FRITZI BORN
Deputy

IN THE COURT OF CIVIL APPEALS
CORPUS CHRISTI

No. 1547

and

IN THE SUPREME COURT OF THE
STATE OF TEXAS

LOIS MAE MILLS, APPELLANT

v.

DAN HABLUETZEL, APPELLEE

"In the Interest of A.B.D., a Minor"

No. B-9337

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed March 6, 1981

Notice is hereby given that Lois Mae Mills, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Civil Appeals of the State of Texas entered January 31, 1980, affirming the Order of Dismissal of the trial court rendered April 4, 1979. A timely petition for Writ of Error to the Supreme Court of the State of Texas was "Refused. No Reversible Error," on July 16, 1980 and overruled a timely Motion for Rehearing on December 10, 1980. This appeal is taken pursuant to 28 U.S.C. § 1257(2).

/s/ Michael S. Mankins
MICHAEL S. MANKINS
Counsel for Appellant
COASTAL BEND LEGAL SERVICES
117 W. Sinton
Sinton, Texas 78387
AC 512-364-3805

SUPREME COURT OF THE UNITED STATES

No. 80-6298

LOIS MAE MILLS, APPELLANT

v.

DAN HABLUETZEL

ON CONSIDERATION of the motion of appellant for leave to proceed herein *in forma pauperis*,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

April 27, 1981

SUPREME COURT OF THE UNITED STATES

No. 80-6298

LOIS MAE MILLS, APPELLANT

v.

DAN HABLUETZEL

APPEAL from the Court of Civil Appeals of Texas, Thirteenth Supreme Judicial District.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

April 27, 1981

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NO. 80-6298

IN THE SUPREME COURT OF THE UNITED STATES

MARCH TERM, 1981

LOIS MAE MILLS,

Appellant

v.

DAN HABLUETZEL,

Appellee

On Appeal From

THE COURT OF CIVIL APPEALS OF TEXAS

MOTION IN THE ALTERNATIVE TO DISMISS OR TO AFFIRM

JOHN H. FLINN
Attorney at Law
Texas Bar No. 07150000
P. O. Box 1112
Sinton, Texas 78387
512/364-4721

Counsel for Appellee.

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NO. 80-6298

IN THE SUPREME COURT OF THE UNITED STATES

MARCH TERM, 1981

LOIS MAE MILLS,

Appellant

v.

DAN HABLUETZEL,

Appellee

MOTION IN THE ALTERNATIVE
TO DISMISS OR TO AFFIRM

MAY IT PLEASE THE COURT:

Appellee moves that the appeal herein taken be dismissed on the ground that the said appeal does not present a substantial federal question.

OPINION BELOW

This is an appeal from a decision of the Court of Civil Appeals, Thirteenth Judicial District of Texas, rejecting Appellant's contentions that Section 13.01 of the Texas Family

Code, Acts 1975, 64th Legislature, Chapter 476, §24 denies to an illegitimate child the equal protection of the law and due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Appellant's jurisdictional statement.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Pertinent constitutional and statutory provisions are set forth in the Appellant's jurisdictional statement.

STATEMENT OF THE CASE

The facts of the case are substantially correct as stated in Appellant's jurisdictional statement, except for the one important fact that Appellee, in his answer in the trial court, emphatically denied paternity of the child.

ARGUMENT

After the decision of this Court in Gomez vs. Perez, 409 U. S. 535 (1973) the legislature of Texas enacted a statutory system, known as Subchapter A of Chapter 13 of the Texas Family

Code, effective in September of 1975, to provide illegitimate children and their mothers a statutory method to establish paternity without the voluntary cooperation of the child's father. As a part of this system Section 13.01 was enacted as a proper limitation on the bringing of such suits. Under this provision the mother of a child would have at least one year, and up to as much as twenty-one months from conception, in which to bring the action to establish paternity. The statute in no way prevents the woman who is en ventre sa mere and not married to the father from filing suit to establish paternity immediately upon discovery of her condition.

In Mathews vs. Lucas, 427 U. S. 495 (1976) it was the holding of this Court that illegitimacy may be a proper classification and that in analyzing such a classification by statute, the question is whether the statutory classification bears a rational relationship to a legitimate governmental interest. The statutory system in question, and the classification therein made, bears a rational relationship to a legitimate governmental interest. It is not an impenetrable barrier to the recovery of support for an illegitimate child. There is no prohibition in Subchapter A to prevent a suit for determination of paternity and support. Because of the nature of the facts to be proved in proving paternity and in defending against

a spurious or fraudulent claim of paternity, the State has a legitimate governmental interest in setting limitations on such claims. There are fundamental differences in proof of paternity in legitimate and illegitimate children. We find in the law with respect to the criminal offense of rape that the doctrine of prompt outcry and short limitation periods are the rule rather than the exception in common law jurisdictions. Similarly, the sex act of consenting parties is not usually executed in public places with any witnesses aside from the participants. Promptness in resolving the responsibility for the natural result of the sex act, that is parantage, would seem to be a most important and legitimate governmental interest. The innocent man, in defending against a spurious or fraudulent claim of paternity, has a right to some protection. The accusing finger of the female is most difficult to turn aside. This is particularly true in view of the difficulties of proof of non-access, access by others, alibi and like defensive matters. Such evidence is notorious for disappearing after a short period of time.

The procedural prescription of the statute does not deny due process, but if followed, provides due process to all illegitimate children. This Court in Nebbia vs. People of the State of New York, 291 U. S. 502 (1934) described due process thusly:

> ...the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained.

Nothing in Section 13.01 prevents a valid claim of paternity. It only reasonably attempts to make a spurious, fraudulent and unconscionably delayed claims less likely of success and attempts to proctect the innocent victim of fraud. No violation of the due process requirement is evident.

Appellant's jurisdictional statement cites only two cases in support of the substantiality of the federal question raised. Both of the cases deal with fact situations where illegitimate children were absolutely prohibited by state action from receiving benefits accorded legitimate children.

The contentions that Section 13.01 of the Texas Family Code denies to appellant equal protection and due process in violation of the Fourteenth Amendment presents no substantial federal question. Appellee's motion in the alternative to dismiss or to affirm should be sustained.

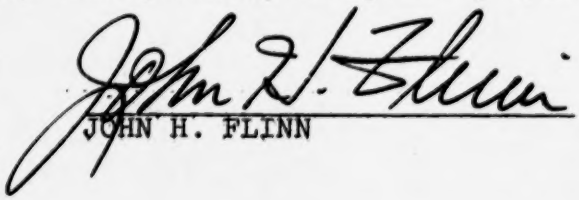
Respectfully submitted,

JOHN H. FLINN
Attorney at Law
Texas Bar No. 07150000
P. O. Box 1112
Sinton, Texas 78387
512/364-4721

Counsel for Appellee.

PROOF OF SERVICE

This is to certify that a copy of this Motion in the Alternative to Dismiss or to Affirm has been served on Appellant by delivering in person a copy to the office of her attorney of record, MICHAEL S. MANKINS, Attorney at Law, 117 W. Sinton, Sinton, Texas, 78387, on April 1, 1981.



JOHN H. FLINN

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No. 80-6298

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LOIS MAE MILLS,
IN THE INTEREST OF
ARCHIE BURTON DUNCAN,
A CHILD, *Appellant,*

v.

DAN HABLUETZEL, *Appellee.*

APPEAL FROM THE COURT OF CIVIL APPEALS OF TEXAS

APPELLEE'S MOTION TO DISMISS AS MOOT

LOLA L. BONNER
Attorney at Law
P.O. Drawer 908
Rockport, Texas 78382
512/729-2353
Counsel of Record

JOHN H. FLINN
Attorney at Law
P.O. Box 1112
Sinton, Texas 78387
512/364-4721
Counsel for Appellee

NO. 80-6298

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OCTOBER TERM, 1980

LOIS MAE MILLS,
IN THE INTEREST OF
ARCHIE BURTON DUNCAN,
A CHILD, APPELLANT,

v.

DAN HABLUETZEL, Appellee.

APPEAL FROM THE COURT OF CIVIL APPEALS OF TEXAS

APPELLEE'S MOTION TO DISMISS AS MOOT

Now comes Appellee herein and moves that the appeal heretofore filed in this cause be dismissed as moot and as grounds therefor would show the Court as follows:

I.

This appeal challenges the constitutionality of the Paternity statute of the State of Texas, which contained, as it was first enacted, a limitation of one year from the date of birth of the illegitimate child within which to file such paternity proceedings.

II.

After such appeal was instituted, the Sixty-Seventh Legislature of the State of Texas, amended Article 13.01, Texas Family Code, (the paternity statute) to enlarge the time for filing suit to establish paternity from one year to four years. The Texas Legislature directed that the change or amendment of the limitation period take effect September 1, 1981. It neither directed nor negated that the statute be given retroactive effect,

although the same Legislative Bill did make specific provision for the effective dates of other amendments encompassed therein. (Appellee's Brief. App. 4a)

It appears likely that the Texas Courts will give retroactive effect to the new statute inasmuch as the change is remedial or procedural in nature and would not affect a vested right of a defendant. The right to establish paternity was granted illegitimates in 1975 when the Texas Legislature enacted Article 13.01, Texas Family Code. The recent change merely expands the time in which to establish paternity. Under Texas holdings, the enlargement of the time within which to bring a paternity suit will likely be considered procedural or remedial in nature and giving retroactive effect thereto will not, therefore, be in

violation of Article 1, Section 16, of the Texas Constitution. Exxon Corporation v. Brecheen, 526 S.W. 2d 519 (Tex. S. Ct. 1975); Ex Parte Abell, 613 S.W. 2d 255 (Tex. S. Ct. 1981)

Two Texas Courts agree that statutes of limitation pertain to remedies and not to substantive rights. Texas Department of Human Resources v. Chapman, 570 S.W. 2d (CCA Dal, 1978, Ref. N.R.E.) and In Interest of Miller, 605 S.W. 2d 332 (CCA Ft. Worth, 1980, Writ Granted)

III.

If retroactive effect is to be given the new law, all illegitimate children born in Texas after September 1, 1977, will be affected and protected by the change. Those born between September 1, 1975, and September 1, 1977, would be governed by the one

year statute of limitations.

IV.

It is the position of the Appellee that before this Court should rule on the constitutionality of the one-year statute, it should first allow the State Courts of Texas to determine whether retroactive effect will be given to the new law.

V.

It is likewise the position of Appellee, that the change made by the Sixty-Seventh Legislature of the State of Texas, renders this appeal moot, because the State has removed the objection of which Appellant complains.

This is not a case that is "capable of repetition, yet evading review" Dunn v. Blumstein, 405 U.S. 330. It is not one in which a voter has been denied the right to

vote in an election long since held pending the appeal, but with rights of future voters undetermined. Nor is it one in which a complaining divorce litigant had acquired residency requirements by the time an appeal was perfected. Sosna v. Iowa, 419 U.S. 393. It is, instead, one in which all paternity suits in Texas may now be brought within four years from date of birth of an illegitimate in lieu of one year from such birth.

V.

The Texas Courts have consistently upheld the constitutionality of the one year limitation in paternity suits. Texas Department of Human Resources v. Chapman, 570 S.W.2d (CCA Dal, 1978, Ref. N.R.E.) The Supreme Court of Texas has granted writ of error in the only cases which held the statute unconstitutional

and has, of the date of preparation of this motion, not rendered a decision in same. In Interest of Miller, 605 S.W. 2d 332 (CCA, Ft. Worth, 1980, Writ Granted)

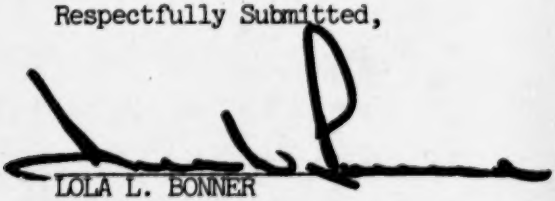
The Fort Worth Court of Civil Appeals found the statute unconstitutional on the ground that it applies only to suits for paternity with no provision being made for suits for maternity.

It would appear, that because of the recent changes in the statute of limitations, this case should be rendered moot or remanded pending determination, by the Texas Courts, of the issue of retroactive application of such recent enlargement of the time for bringing paternity suits.

WHEREFORE, Appellee prays judgment of this Court that the appeal be rendered moot

or alternatively that the case be remanded until the Texas Court can decide upon the constitutional issue of retroactive effect to be given to the new law.

Respectfully Submitted,



LOLA L. BONNER
Attorney at Law
P. O. Drawer 908
Rockport, Texas 78382
512/729-2352
COUNSEL OF RECORD

JOHN H. FLINN
Attorney at Law
P. O. Box 1112
Sinton, Texas 78387
512/364-4721
COUNSEL FOR APPELLEE

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ALEXANDER L. STEVAS,

No. 80-6298

IN THE

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OCTOBER TERM, 1980

LOIS MAE MILLS,
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ARCHIE BURTON DUNCAN,
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v.

DAN HABLUETZEL, *Appellee.*

APPEAL FROM THE COURT OF CIVIL APPEALS OF TEXAS

APPELLANT'S BRIEF ON THE MERITS

MICHAEL S. MANKINS
COASTAL BEND LEGAL SERVICES
117 W. Sinton Street
Sinton, Texas 78387
(512) 364-3805
Counsel for Appellant

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QUESTION PRESENTED

Whether the one year statue of limitations of Texas Family Code Section 13.01 (1975) governing paternity and child support actions for illegitimate children violates the Fourteenth Amendment of the Constitution of the United States by discriminating against illegitimate children without any appropriate relationship to legitimate state interest.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

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LOIS MAE MILLS,
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A CHILD, *Appellant,*

v.

DAN HABLUETZEL, *Appellee.*

APPEAL FROM THE COURT OF CIVIL APPEALS OF TEXAS

APPELLANT'S BRIEF ON THE MERITS

OPINIONS BELOW

The opinion of the Court of Civil Appeals, Thirteenth Judicial District of Texas is not reported (J.A. 15).

The Texas Supreme Court's decision to refuse Appellant's Writ of Error and Motion for Rehearing is not reported (J.A. 20).

STATEMENT OF JURISDICTION

The refusal of Appellant's Motion for Rehearing by the Supreme Court of Texas on December 10, 1980 (J.A. 20, 22), forever denies appellant the right to sue for paternal child support making the judgment of the Court of Civil Appeals (J.A. 16-19) Thirteenth Supreme Judicial District reviewable as a final judgment.

A notice of appeal to this Court was duly filed in the Court of Civil Appeals, Thirteenth Supreme Judicial District of Texas, and in the Supreme Court of Texas on March 6, 1981 (J.A. 22).

This appeal was docketed on March 7, 1981 in this Court within 90 days from the overruling of the Motion for Rehearing in The Supreme Court of Texas (J.A. 20). The jurisdiction of this court is invoked under 28 U.S.C. § 1257(2).

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STATEMENT OF THE CASE

Lois Mae Mills and the Texas Department of Human Resources filed a paternity suit on behalf of Archie Burton Duncan an illegitimate child (J.A. 2-6). The suit named Dan Habluetzel as Archie Duncan's natural father.

Suit was filed in the 156th Judicial District Court sitting in Sinton, San Patricio County, Texas on October 6, 1978. On the date of filing Archie Burton Duncan was one year, seven months, and twenty-four days old. Dan Habluetzel timely filed his written answer and pled the one year statute of limitations of Section 13.01[1] of the Texas Family Code (J.A. 7-8).

In an objection to a motion to dismiss in the trial court, the Appellant here claimed that Section 13.01 of the Texas Family Code violates the rights of illegitimate children under the 14th Amendment of the United States Constitution. The District Court, however, granted the Motion to Dismiss and entered a dismissal order against Lois Mae Mills and the Department of Human Resources. (J.A. 9).

Lois Mae Mills and the Department of Human Resources filed a timely appeal in the Texas Court of Civil Appeals, 13th Judicial District (J.A. 10). The Court of Civil Appeals affirmed. (J.A. 16-19). It ruled that Section 13.01 of the Texas Family Code did not violate the 14th Amendment. The Court's opinion states: "We have addressed these . . . [constitutional claims] and found them meritless in the *Texas*

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[1] The Texas legislature has amended Section 13.01 to create a four year statute of limitations. At this time, however, the governor has not signed the amendment into law. Texas Courts have ruled that the Texas Constitution Art. I Section 16 (1955) prevents the revival by statute of a cause of action once the limitation period has run because the limitation has become a vested right of the defendant. *Southern Pac. Transport Co.* v. *Texas,* 380 S.W.2d 123 (Tex. Civ. App.-Houston 1964, no writ), *Texas* v. *Williamson — Dickie Manufacturing Co.,* 399 S.W.2d 568 (Tex. Ann. App. Ft. Worth 1966, Ref. N.R.E.)

Department of Human Resources v. *Hernandez*, 595 S.W.2d 189 (Tex. Civ. App.-Corpus Christi 1980 Ref. N.R.E.). Based on the reasoning set forth in *Hernandez*, we overrule points of error 1 through 3." In *Hernandez* at 192, the Court of Civil Appeal said: "Section 13.01 is not unconstitutional. We overrule the points of error dealing with alleged violations of equal protection and due process." The Court thus considered and expressly rejected this federal constitutional claim.

A Writ of Error was filed in the Texas Supreme Court on the 18th day of April, 1980. The application for Writ of Error was subsequently refused, no reversable error, by the Texas Supreme Court on July 16, 1980 (J.A. 20). A motion for rehearing was overruled on December 10, 1980, by the Supreme Court of Texas. (J.A. 20).

Notice of Appeal was given to the Supreme Court of Texas and to the Court of Civil Appeals for the 13th Supreme Judicial District of Texas on the 6th day of March, 1981 (J.A. 22), and this cause was docketed in the Supreme Court of the United States on March 7, 1981. Probable jurisdiction was noted on April 27, 1981 (J.A. 24).

SUMMARY OF ARGUMENT

I. Texas Family Code Section 13.01 (1975) denies illegitimate children the equal protection of the laws in collecting child support afforded to legitimate children under Texas law and therefore is unconstitutional. Under the Texas Family Code 14.05(a) and 12.04, legitimate children have an ongoing judicially enforceable right to child support. Further, Texas Courts have held this right to be the personal right of the child that can be initiated at any time until the child turns 18.

Section 13.01, however, requires that if an illegitimate child, or someone on his behalf, wants to collect child support from the child's natural father, then a suit to establish paternity must be filed before the child turns one year old or the suit is forever barred.

This Court in *Gomez* v. *Perez* 409 U.S. 535 (1973) ruled that once a state creates a right for child support for legitimate chil-

dren then this right must not be denied to illegitimate children. *Gomez* struck down Texas' law that completely denied illegitimate children support rights from their natural fathers and implied that the state must accord to illegitimate children a procedure whereby paternity is proven and child support is obtained.

Texas' response to the *Gomez* mandate is Texas Family Code Chapter 13 Subchapter A. This response, particularly the one year limitations Section 13.01, can only be viewed as a belated and grudging attempt to do the absolute minimum for illegitimate children. In fact these provisions have greatly restricted the rights afforded to legitimates, after *Gomez*, by the Texas courts which had extended the same rights to file to both classes of children. *Alvarado* v. *Gonzalez* 552 S.W.2d 539 (Texas Civ. App. Corpus Christi, 1977 no writ).

The one year statute of limitations fails the heightened scrutiny test applied in *Mathews* v. *Lucas* 427 U.S. 495 (1976) and its progency because such a limitation period is not carefully tuned to alternative considerations nor is it substantially related to a permissble state interest.

A. The state interest in a one year limitation of actions asserted by Texas courts was the prevention of stale and fraudulent claims. *Texas Department of Human Resources* v. *Chapman* 570 S.W.2d 46 (Tex. Civ. App. Dallas 1978 Ref. N.R.E.). This purported state interest is not substantial, however, in view of the fact that Tex. Rev. Civ. Stat. Ann. Art. 5535 (1968) tolls all other conceivable statutes of limitations for minors in Texas. Section 13.01 is the only statute of limitations that applies to cut off the rights of a child in any civil suit. Further, Texas common law has traditionally tolled limitations on infants where no minority tolling was provided by statute. *McCrary* v. *City of Odessa* 482 S.W.2d 151 (Tex. 1971). Moreover, there is no limitation barring a presumed father at any time from contesting and disproving his paternity of children born of a marriage. *Davis* v. *Davis* 521 S.W.2d 603 (Tex. 1975). Children thus bastardized and over one year old would have no right to file suit against their real, natural fathers due to Section 13.01.

The significance of the state interest as stated by *Chapman, supra* is further eroded when the unique quality of paternity evidence is considered. This court has recognized the utility of blood tests in paternity suits. *Little* v. *Streater* 49 L.W. 4581 (June 1, 1981). Blood tests as evidence virtually can prove or disprove paternity; such evidence lasts forever, and provides highly objective evidence of who the actual father of a child really is.

B. The one year statute of limitations moreover is not carefully tuned to the purpose of preventing stale or fraudulent paternity claims. Section 13.01 is a blanket and conclusive exclusion of a subclass of illegitimate children. Such a mechanism is overly broad for the purpose it seeks to accomplish; and there is no reason for denying all illegitimate children older than a year even the opportunity to present what might be convincing proof of paternity. This is particularly true in light of the level of reliability of blood test evidence as acknowledged in *Little* v. *Streater, supra* and the tolling under Texas law of all other limitation periods in suits involving minors.

Finally, if a father denies paternity of a child over one year old who was born or conceived during his marriage to the child's mother, Texas laws presume the legitimacy of the child. Family Code Section 12.02(a)(b)(1979). Problems with stale proof in this situation are governed by rules concerning the distribution of the burden of proof. In contrast the situation of an alleged father of an illegitimate child, over one year old, is governed by an absolute bar to the paternity claim. The problems of stale proof, however, are the same in both situations. Section 13.01 acts to bar paternity suits in a fashion which is not rationally related to difficulties of proof and is therefore not carefully tuned to alternative considerations as required by *Lalli* v. *Lalli* 439 U.S. 259 (1978).

C. The limitation period of Section 13.01 is also not "carefully tuned" to alternative state interests. The primary purpose of Chapter 13 Subchapter A is to provide support for

illegitimate children yet such a short time limit defeats this purpose. Further, the state interest of ensuring that child support falls on both natural parents, rather than on the taxpayers of the state, by keeping illegitimate children off the welfare rolls, is substantial yet Section 13.01 frustrates this interest, as well as subordinating the welfare of the children, in an attempt to prevent allegedly stale or fraudulent claims of parentage.

II. Chapter 13 Subchapter A denies illegitimate children the fundamental due process requirement of a meaningful opportunity to have their claims heard. *Armstrong* v. *Manzo*, 380 U.S. 545 (1965). First, the Section 13.01 one year limitation denies illegitimate children a meaningful time in which to present their claims for paternity. This denial of the child's right is coupled with the fact that Subchapter A has no provisions for anyone to bring the suit on behalf of the child affected; neither does the statute afford notice to anyone of the potential loss of rights if the suit is not filed within one year. The denial of notice contravenes the requirement of the due process clause. *Memphis Light, Gas and Water Division* v. *Cratt*, 436 U.S. 1 (1978); *Goldberg* v. *Kelly*, 397 U.S. 290 (1970).

The infant under one year old is obviously without the ability to assert his rights himself. The mother, usually the only other one with a personal interest in establishing paternity, may not be interested in doing so because of her relationship with the father, fear of the father, the social stigma of such a suit, ignorance, confusion or lack of funds. Yet Texas law provides no scheme whereby the mother, or anyone else who might be interested in the welfare of the child, is provided with notice of the one year limitation or of the consequences of the failure to file for paternity within one year. The inability of the child to file a paternity suit himself within one year along with the absence of both a mechanism seeing to it that either a suit will be filed or knowingly not filed and the lack of any notice of the potential loss of rights means that the right to child support is settled, i.e., lost without any realistic opportunity to be heard.

ARGUMENT

I. Introduction

Under Section 14.05(a) of the Texas Family Code, a legitimate child has an ongoing judicially enforceable cause of action for child support until the child reaches 18. Section 12.04 of the Code provides that this right to support exists against both parents. The Texas courts have held that the right to support of a legitimate child lies with the child and may be initiated in court at any time until the child turns 18. *Charvis* v. *Charvis*, 529 S.W.2d 814 (Texas Civil Appeals - Tyler 1975, no writ).

Prior to January 17, 1973, the law in Texas imposed duties on fathers to support legitimate children, but completely denied to illegitimate children that right to support. *Compare, Gully* v. *Gully*, 231 S.W. 97 (Tex. Supp. 1921) with *Home of the Holy Infancy* v. *Kaska*, 397 S.W.2d 208 (Tex. Supp. 1966). In *Gomez* v. *Perez*, 409 U.S. 535 (1973), this Court struck down that scheme as a violation of the Equal Protection Clause of the Fourteenth Amendment. *Gomez* was one of a series of equal protection decisions by this Court that have removed illegitimate children from the medieval legal nether world they previously inhabited for centuries. In *Gomez* the Court held:

> Once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers, there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother. (409 U.S. at 538)

Implicit in *Gomez* was the notion that the state must accord to an illegitimate child a right to institute a judicial proceeding for the purpose of proving the identity of a biological father in order to obtain a judicially enforceable support right otherwise accorded to legitimate children generally.

The statute at issue in this case — Texas Family Code Section 13.01 (1975) — is Texas' belated, grudging, and unconstitutional response to the *Gomez* mandate. Texas Family

Code Chapter 13 provides the only method whereby an illegitimate child may establish paternity and receive child support. Section 13.01 requires that any lawsuit to establish paternity must be filed before the illegitimate child is one year old or any suit is forever barred.

The history of Texas' response to *Gomez* is described fully in *Texas Department of Human Resources* v. *Hernandez*, 595 S.W.2d 189 (Tex. Civ. App.-Corpus Christi 1980 Ref. N.R.E.):

> After *Gomez* the legislature enacted Title 2 of the Family Code governing the parent-child relationship. Tex. Laws 1973, ch. 543 at 1411. Understandably, in drafting Title 2, the legislature considered comprehensive provisions regulating the legal aspects of children born out of wedlock. Despite the *Gomez* decision, however, such comprehensive provisions were not passed. Instead, the legislative "response" to *Gomez* was found in Chapter 13 of the Family Code which provided for voluntary legitimization proceedings. Smith, Commentary on Title 2 of the Family Code, 5 *Tex. Tech. L. Rev.* 389, 418 (1974). It was later held, however, that when the legislature provided judicial relief against the father on behalf of a legitimate child for support, due to *Gomez* it necessarily provided the same relief on behalf of an illegitimate child. In the Interest of R____ V____ M____, 530 S.W.2d 921 (Tex. Civ. App. — Waco 1975, no writ). Thus, after the effective date of Title 2, which was January 1, 1974, illegitimate children had judicially enforceable support rights, whether by common law or by statute, against their biological fathers. *Gomez*, supra; *Wynn*, supra; In the Interest of R____ V____ M____, supra.
>
> Remaining in a state of flux, the statutory rights of illegitimates were brought into sharper focus by amendments to Chapter 13 of Title 2 of the Family Code, the effective date of which was September 1, 1975. The result was the present involuntary legitimation proceeding found in Sections 13.01 through 13.09 of the Family Code.
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> * * *
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> Section 13.01 of the Family Code, . . . requires that paternity suits be filed at least one year from the birth of the child . . .

Thus while the Texas legislature failed to act, the courts brought Texas into compliance with *Gomez* and its requirement that the state extend the same judicially enforceable support rights to illegitimate children as to legitimate children. After a two year period during which illegitimate children were accorded the same constitutionally adequate equal rights to support that legitimate children had,[2] cause of action at any time during childhood, the Texas legislature substantially reduced the rights resulting from *Gomez*. The one year statute of limitations is a grudging and wholly inadequate implementation of the *Gomez* holding and principles and is best understood as continuing the discrimination that historically has been directed toward illegitimate children and that this Court consistently has condemned. This Court has voiced that condemnation through application of an enhanced standard of equal protection applied to discrimination against illegitimate children.

In *Mathews* v. *Lucas*, 427 U.S. 495 (1976) the Court held that discrimination against illegitimate children is not subject to an equal protection "strict scrutiny" test, but also made clear that normal "rational basis" equal protection review is inappropriate. Rather, the Court articulated a form of heightened scrutiny review applicable to discrimination on the basis of illegitimacy. The opinion emphasized that the standard of review applied is "not a toothless one." *Mathews* v. *Lucas* 427 U.S. 495, 510 (1976).

The Court in *Lucas* relied on a perception of the disfavored status of illegitimacy and the resulting discrimination and reaffirmed *Weber* v. *Aetna Casualty & Surety Company*, 406 U.S. 164 (1972); *Gomez* v. *Perez*, 409 U.S. 535 (1973); and

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[2] In *Alvarado* v. *Gonzalez*, 552 S.W.2d 539 (Tex. Civ. App. — Corpus Christi 1977, no writ) the court held that illegitimate children born prior to September 1, 1975 could file paternity suits until they reached 18 years of age. Only children born on or after September 1, 1975 were bound by the one year statute of limitations of Section 13.01.

Jimenez v. *Weinberger*, 417 U.S. 628 (1974), all of which subjected classifications based on illegitimacy to rigorous scrutiny, and found them to offend the Equal Protection Clause.

The statute in *Lucas* survived rigorous review because it granted benefits to illegitimate children who met any of several alternative criteria for entitlement, covering almost all conceivable sub-classes; the scheme was based on "reasonable empirical judgments that [were] consistent with a design to qualify entitlement" and accorded illegitimate children a full opportunity to present relevant evidence. [427 U.S. at 510]. "[T]he statute [in *Lucas* did] not broadly discriminate between legitimates and illegitimates without more, but [was] carefully tuned to alternative considerations." [427 U.S. at 513]. The Court reaffirmed its previous statements that ". . . the legal status of illegitimacy, however defined, is like race or national origin, a characteristic determined by causes not within the control of the illegitimate individual, and it bears no relation to the individual's ability to participate in and contribute to society," and that imposing disabilities on innocent children simply because of their birth status remains "illogical and unjust." *Lucas*, [427 U.S. at 505].

In *Trimble* v. *Gordon*, 430 U.S. 762, 767 (1977), the Court noted that "illegitimacy is analogous in many respects to the personal characteristics that have been held to be suspect when used as the basis of statutory differentiations [but] the analogy was not sufficient to require 'our most exacting scrutiny.'" Nevertheless, "[i]n a case like this, the Equal Protection Clause requires more than the mere incantation of a proper state purpose." [430 U.S. at 769.]

Lalli v. *Lalli*, 439 U.S. 259, 265 (1978) similarly held that classifications based on illegitimacy "are not subject to 'strict scrutiny,' [but] they nevertheless are invalid under the Fourteenth Amendment if they are not substantially related to permissible state interests." Thus, "a statute placing exceptional burdens on illegitimate children in the furtherance of proper state objectives must be more 'carefully tuned to alternative considerations.'" *Lalli*, *supra*, 439 U.S. at 266, quoting *Trim-*

ble v. *Gordon, supra,* and *Mathews* v. *Lucas, supra.* Further, the relation of the statutory discrimination to state interests must be "*evident and substantial.*" *Lalli, supra* 439 U.S. at 268. (Emphasis added).

In sum, the Court has upheld statutory classifications discriminating against illegitimate children only "[i]n cases where statutory classifications affecting illegitimates are so *precisely structured* as to further a *sufficiently adequate* state interest . . ." *Parham* v. *Hughes,* 441 U.S. 347, 352 n.5 (1979). (Emphasis added.)

Texas' grudging response to *Gomez* is best understood as an outgrowth of the very factors that have led this Court to apply heightened scrutiny to discrimination against illegitimate children. Such discrimination "is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing . . . [P]enalizing the illegitimate child is an ineffectual — as well as unjust — way of deterring the parent." *Weber* v. *Aetna Casualty & Surety Co.,* 406 U.S. 164, 175 (1972). This Court has always subjected to special scrutiny invidious discrimination against groups on the basis of the conditions of their birth or ancestry. *See, e.g., Loving* v. *Virginia,* 388 U.S. 1 (1967); *In re Griffiths,* 413 U.S. 717 (1973); *Oyama* v. *California,* 332 U.S. 633 (1945); *Hirabayashi* v. *U.S.,* 320 U.S. 81, 100 (1942).[3]

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[3] See also *Regents of the University of California* v. *Bakke,* 438 U.S. 265 (1978), *Frontier* v. *Richardson* 411 U.S. 677 (1973). One hundred years ago this Court recognized that the Constitutional prohibition against Forfeitures of the Blood was a reaction to the "rank injustice" when "innocent children were made to suffer because of the offense of their ancestor." *Wallach* v. *Van Riswick,* 92 U.S. 202, 210 (1875). Discrimination against illegitimate children has been compared to attaching "an archaic corruption of the blood, a form of bill of attainder," *King* v. *Smith,* 392 U.S. 309, 336 n.5 (1968), Douglas, J., concurring, and with a "badge of ignobility," violating Art. 1, § 9, Clause 8 of the Constitution, *Eskra* v. *Morton,* 524 F.2d 9, 13 n.8 (7th Cir. 1975).

Like other statutes that have received heightened judicial solicitude, illegitimacy subjects a child to "a stigma of inferiority and a badge of opprobrium." Note, *Developments in the Law of Equal Protection*, 82 *Harv. L.Rev.* 1065, 1127 (1969). As this Court stated in *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 175-76 (1972):

> The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. ***Courts are powerless to prevent the *social opprobrium suffered by these hapless children*, but the Equal Protection Clause does enable us to strike down discriminatory laws relating to *status of birth* where — as in this case — the classification is justified by no legitimate state interest, compelling or otherwise. (Emphasis added.)

See also, Jimenez v. *Weinberger*, 417 U.S. 628, 632 (1974); Krause, *Illegitimacy, Law and Social Policy* (1971); Krause; "Equal Protection for the Illegitimate," 65 *Mich. L.Rev.* 477 (1967).[4]

Heightened scrutiny thus has been found necessary and appropriate by this Court in enforcing the Equal Protection

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[4] When children are stigmatized because of a condition of their birth, the stigma generates a feeling of inferiority that may inflict long-term damage, as this Court recognized in *Brown* v. *Board of Education*, 347 U.S. 483, 494 (1954). Legal reinforcement of the stigma should be scrutinized with particular care.

> To give the illegitimate child an inferior status because, through no fault of his own, his parents were never joined in an easily dissolved union is a hypocrisy which can only frustrate and alienate him from the society which created his inferiority.

Marcus, "Equal Protection: The Custody of the Illegitimate Child," 11 *Journal of Family Law* 1, 17-18 (1971). Illegitimate children become increasingly aware of their socially inferior status, and show differences in "adjustment, as well as lower IQ; the differences increase with age." Jenkins, "An Experimental Study of the Relationship of Legitimate and Illegitimate Birth Status to School and Personal and Social Adjustment of Negro Children," 64 *American Journal of Sociology* 196 (1958).

Clause on behalf of these children who have suffered "through the ages society's 'illogical and unjust' condemnation," *Weber, supra,* 406 U.S. at 175.

II. Section 13.01 of the Texas Family Code Denies Illegitimate Children Equal Protection of the Laws.

Texas invidiously discriminates against illegitimate children over one year of age by denying them the means ever to obtain child support when child support is obtainable by legitimate children generally and regardless of age at the commencement of proceedings. The one-year limitation of Section 13.01 of the Family Code violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, because it denies equal support rights to illegitimate children over one year of age, without any rational much less substantial relationship to any legitimate state interest. It violates the basic principle that "a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally." *Gomez* v. *Perez,* 409 U.S. 535, 538, (1973).

Lois Mae Mills and the Texas Department of Human Resources originally filed this suit on behalf of Archie Burton Duncan. The lawsuit was an attempt to obtain child support for Archie Burton Duncan by establishing paternity, as required by Chapter 13 Subchapter A of the Texas Family Code.

The Texas Department of Human Resources was a plaintiff because of the requirements of federal statutes regarding paternity determination and child support collection for children receiving welfare benfits. Under the Aid to Families with Dependent Children statute, Ms. Mills as an applicant or recipient of benefits was required to "cooperate with the State (i) in establishing the paternity of a child born out of wedlock with respect to whom aid is claimed, and (ii) in obtaining support payments for such applicant and a child with respect to whom such aid is claimed . . ." 42 U.S.C. § 602(a)(26)(B). The mother receiving AFDC must also "assign the State any rights" to child support. 42 U.S.C. § 602(a)(26)(A). The *state*

then must "undertake (A) in the case of a child born out of wedlock with respect to whom an assignment under Section 602(a)(26) of this title is effective, to establish the paternity of such child . . . and (B) . . . to secure support for such child from his parent . . ." 42 U.S.C. § 654(4). The state paternity/child support collection services must also be made available to non-welfare recipients. 42 U.S.C. § 654(6).[5] The statute was a product of the Senate Finance Committee's concerns that welfare costs be decreased *and* that each child have a right to support, inheritance and to know who his or her father is:

> The committee believes that an AFDC child has a right to have its paternity ascertained in a fair and efficient manner. Although this may in some cases conflict with the mother's short-term interests, the committee feels that the child's right to support, inheritance, and his right to know who his father is deserves the higher social priority.

Senate Report No. 93-1356, — reprinted in [1974] U.S. Code Cong. & Admin. News 8133, 8155, 8156.

This Court has also recognized that the "right . . . to needed support from . . . fathers [is] an essential right." *Gomez* v. *Perez*, 409 U.S. 535, 538. Food, clothing, shelter and education are basic needs for the child that are provided either through parental support or public welfare.

> It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. *Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1944); *Quilloin* v. *Walcott*, 434 U.S. 246, 254 (1978).

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[5] The Texas statute raises some question, not presented in this case of whether a state paternity statute of limitations is pre-empted by the federal law, at least with regard to welfare recipients. *See, Jones* v. *Rath Packing*, 430 U.S. 519, (1977) (state law pre-empted where federal "goal cannot be accomplished"); *Hines* v. *Davidowitz*, 312 U.S. 52, 70 (1940) (state law pre-empted where it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"); *Perez* v. *Campbell*, 402 U.S. 637 (1971).

Texas provides to legitimate children an enforceable right to receive essential child support. A legitimate child, under Sections 12.04 and 14.05 of the Family Code, has the right to an ongoing duty of support by both parents until the child reaches 18 (and in some situations beyond).[6] Further, Texas courts have held that this right lies with the child, and may be instituted at any time until the child reaches 18 or is otherwise emancipated under Texas law. *Charvis* v. *Charvis*, 529 S.W.2d 814 (Texas Civil Appeals — Tyler 1975, no writ).[7] Failure to toll statutes of limitation only in contested paternity cases is invidious discrimination.

On the other hand, the child support right for illegitimate children under Texas law is grossly truncated. Paternity suits under Chapter 13 are a prerequisite to an illegitimate child's ability to receive from its natural father. *Texas Department of Human Resources* v. *Delley*, 581 S.W.2d 519 (Texas Civil Appeals Dallas 1979, writ ref. N.R.E.). The claim for child support, through the paternity action, thus must be brought within one year of the illegitimate child's birth.[8]

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[6] Under Texas Family Code Section 14.05(b)(1979) if the court finds that the child, whether institutionalized or not, requires continuous care and personal supervision because of a mental or physical disability and will not be able to support himself, the court may order that payments for the support of the child shall be continued after the 18th birthday and extended for an indefinite period.

[7] With the exception of the statute at issue in this case, all statutes of limitations are tolled during minority by Texas law. Tex. Rev. Civ. Stat. Ann. Art. 5535 (1968). Further, it has been a long standing proposition of Texas Jurisdiction that statutes of limitation do not run against an infant, *Lacy* v. *Williams*, 8 Texas 182 (1852). In fact, Texas courts have applied this state common law rule to toll statutes of limitation where no minority tolling provision had been provided by law. *McCrary* v. *City of Odessa*, 482 S.W.2d 151 (Texas 1971) and *Latcholia* v. *Texas Employers Association*, 167 S.W.2d 164 (Comm. of App. Sec. A 1942).

[8] The sole method of proving paternity, in Texas courts, other than by agreement of the parties, is through a suit brought pursuant to the provisions of Chapter 13, Subchapter A of the Family Code. Section

Thus, Texas has ignored the holding of *Gomez* that "[o]nce a State posits a judicially enforceable right on behalf of children who need support from their natural fathers, there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother." *Gomez* v. *Perez* 409 U.S. 535, 539 (1973). Archie Duncan has been denied the opportunity to obtain a judicially enforceable right of needed support at the same time in his life that other, legitimate children retain that opportunity. Such a distinction between illegitimate and legitimate children bears no rational relationship to any legitimate state interest, much less does it meet the heightened standard of review applied in the illegitimacy cases discussed *supra* at pp. 11-12.

III. The Invidious Discrimination Can Not Be Justified By Alleged Concern Regarding Fraudulent Or Stale Claims

A. The Texas courts have alluded to only one governmental interest as a putative justification for the one-year statute of limitations: the prevention of stale or fraudulent claims and the trial cases while the evidence is fresh. *Texas Department of Human Resources* v. *Chapman*, 570 S.W.2d 46 (Tex. Civ. App. Dallas 1978 Ref. N.R.E.).[9] The blanket one

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4(a) of Senate Bill No. 168, Acts of the 63rd Legislature, Regular Session 1973, provides that when the act takes effect on January 1, 1974, it (Chapter 13) governs all proceedings, orders, judgments and decrees in suits brought after it takes effect.

[9]The other rationale often asserted for discrimination against illegitimate children — protecting and strenghtening family life — has been rejected definitively by this Court as a legitimate or sufficient state interest for denying benefits or rights to innocent illegitimate children. "The basic rationale of [the Court's illegitimacy] decisions is that it is unjust and ineffective for society to express its condemnation of procreation outside the marital relationship by punishing the illegitimate child who is in no way responsible for his situation and is unable to change it." *Parham* v. *Hughes*, 441 U.S. 347, 352 (1979). *See also, Trimble* v. *Gordon*, 430 U.S. 762, 770-71;

year-limitation is hardly "carefully tuned" to achieve this purpose. The purported state interest is not "sufficiently adequate" nor is the one-year statute of limitations sufficiently "precisely structured" to permit the discrimination to withstand constitutional scrutiny. *Parham* v. *Hughes*, 441 U.S. 347, 352 (1979).

This Court has not tolerated general and over-inclusive prophylactic rules which broadly discriminate against illegitimate children because of problems of proving paternity. As stated in *Gomez* v. *Perz*, 409 U.S. 535, 538, itself:

> We recognize the lurking problems with respect to proof of paternity. Those problems are not to be lightly brushed aside, but neither can they be made into an impenetrable barrier that works to shield otherwise invidious discrimination. *Stanley* v. *Illinois*, 405 U.S. 645, 656-657 (1972); *Carrington* v. *Rush*, 380 U.S. 89 (1965).

In *Stanley* v. *Illinois*, 405 U.S. 645, 656-57 (1972), the Court said:

> The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. ***Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issue . . ., when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.

The decisions in the illegitimacy cases thus establish that the Court is not unmindful that determination of paternity occasionally presents a problem of proof, and that the Court will give limited deference to the government's method of

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N.J.W.R.O. v. *Cahill*, 411 U.S. 619, 621 (1973); *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972) ("illogical and unjust"); *Glona* v. *American Guarantee & Liability Insurance Co.*, 391 U.S. 72, 75 (1968).

determining the validity of an individual claim so long as the claim can be presented on an equal basis by illegitimate children. The opinions also establish, however, that the problems of proof connected with paternity do not mean that a "blanket and conclusive exclusion of a subclass of illegitimates is reasonably related to the prevention of spurious claims." *Jimenez* v. *Weinberger*, 417 U.S. 628, 636 (1974). *See also*, *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 1975 (1972).[10]

This is particulary true when — as in paternity/support cases in contrast to intestacy cases — the putative father is alive and can defend against the claim.

> Accuracy is enhanced by placing paternity disputes in a judicial forum during the lifetime of the father. As the New York Court of Appeals observed in its first opinion in this case, the "availability [of the putative father] should be a substantial factor contributing to the reliability of the fact-finding process." *In re Lalli*, 38 N.Y. 2d at 82, 340 N.E.2d at 724. In addition, requiring that the order be issued during the father's lifetime permits a man to defend his reputation against "unjust accusations in paternity claims," which was a secondary purpose of § 4-1.2. Commission Report 266.
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> Fraudulent assertions of paternity will be much less likely to succeed, or even to arise where the proof is put before a court of law at a time when the putative father is available to respond, rather than first brought to light when the distribution of the assets of an estate is in the offing.

Lalli v. *Lalli*, 439 U.S. 259, 271-72 (1978).[11]

B. A one-year limitation might be seen as a means of eliminating cases in which innocent men are forced to defend

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[10] If some sub-groups of illegitimate children present disproportionate proof problems, then the legislative remedies must "meet the cases presenting those problems without arbitrarily exterminating those which do not." *Miller* v. *Laird*, 349 F.Supp. 1034, 1046 (D.D.C. 1972) (three-judge court).

[11] The other elements unique to probate proceedings — problems of notice to unknown claimants and the state's strong interest in fi-

against assertions of paternity when the quality of proof has been diminished by the passage of time. On closer examination, however, the limitation can not be seen as an appropriate mechanism for ensuring the quality of proof in support actions. It is the burden of proof, not a statute of limitations, that ensures that innocent men are not forced wrongfully to provide support. There is no reason for denying even the opportunity to present what might be, in any given case, compelling and convincing proof of paternity.

> Opening the courts to suits of this kind may conceivably be a temptation to some to assert motherhood fraudulently. That problem, however, concerns burden of proof. Where the claimant is plainly the mother, the state denies equal protection of the laws to withhold relief merely because the child, wrongfully killed, was born to her out of wedlock. *Glona* v. *American Guarantee & Liability Insurance Co.*, 391 U.S. 72, 76 (1968).

The absence of a parallel statute of limitations in paternity disputes involving legitimate children demonstrates that the one-year limitation does not reasonably serve the purpose of assuring the quality of proof in support actions. A legitimate child may bring an action for support at any time during his minority. if the husband of the legitimate child's mother denies paternity, he may find it difficult to produce evidence that he did not have intercourse with the mother at the time of conception. The passage of time affects such a putative father as much as it would affect the putative father of an illegitimate child, and the nature of the evidence at issue when a husband denies paternity of a child born during his marriage is no different from that in actions for support by illegitimate children. See, *Note,* "Presumption of Legitimacy — Proof Necessary to Rebut Presumption," 41 *Chi. Kent L.Rev.* 136 (1964). yet there is no limitation on the *legitimate* child's right

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nality of property transfers after death, *Lalli* v. *Lalli,* 439 U.S. at 270, are also not present in paternity proceedings during the father's lifetime. *See, Lalli* v. *Lalli,* 439 U.S. at 268 n.6 and accompanying text.

to support, even though that child's paternity can be brought into issue and disproved by the presumed father at any time. *Davis* v. *Davis*, 521 S.W.2d 603 (Texas 1975), *Furlow* v. *Harris County Child Welare Unit*, 527 S.W.2d 802 (Tex. Civ. App. — Houston [1st District] 1975, no writ). There is an evidentiary presumption, that a child born or conceived during wedlock is legitimate as to the husband of its mother in contrast, the situation of the putative father denying paternity of the illegitimate child is governed by an absolute bar to the claim, a bar that the state seeks to justify by alluding to "stale proof" problems that are present in both situations.

The Texas statute acts to bar or permit an action for support without regard to difficulties of proof. The rational and usual way in which courts deal with "spurious" claims is through rules relating to the burden of proof and the admissibility of evidence. See, *Krause*, "Legitimate and Illegitimate Offspring of *Levy* v. *Louisiana* — First Decisions on Equal Protection and Paternity," 36 *U. Chi. L.Rev.* 338, 349-53 (1969). The state's interest in protecting innocent men from spurious claims does not justify the severe restriction that Texas has placed upon illegitimate children.[12]

The claim for current and future child support is not, moreover, a "stale" claim in the normal sense of a cause of action for lump-sum liability which is terminated by a statute of limitations.[13] Under Texas law, child support is an ongoing right

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[12] The putative father is also given other protection pursuant to the Texas Family Code. Venue for the paternity suit lies in the county of the alledged father's residency. Section 13.41. The possibility of the use of the suit for blackmail or extortion are reduced because Section 11.08(c) makes the suit confidential. Finally Section 13.02(b) requires the trial court to dismiss the lawsuit if the mother refuses to submit to blood tests as required by Section 13.02(a).

[13] Since the issue in this case is the technical barrier Texas has raised to actions for future child support for the illegitimate child, it is unnecessary for the Court to reach the issue of whether, if the paternity statute of limitations is held unconstitutional, the child has

and the amount can be adjusted continuously. As the Florida Supreme Court said the four-year Florida statute of limitations for paternity actions, violative of the Equal Protection Clause:

> The state's objective to avoid stale claims, however, is not valid justification for the discrimination it inflicts on illegitimates since their right to support is a continuing right renewing itself until the child becomes eighteen. *An action to determine paternity is not a stale claim when employed as a prerequisite to an illegitimate's obtaining of continuing, recurring support. This right has never become dormant, and for the statute of limitations to act to preclude this right on the basis that it is stale is illogical.*
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> *Furthermore, this statute bears at best a tenuous relationship to the interest it seeks to advance of ensuring the availability of adequate proof of paternity.* The arbitrary determination that paternity can only be proved in four years creates impenetrable barrier to an illegitimate child's right to seek support without considering alternatives which deal directly with the problem of proof.
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> We also note that competing and conflicting state interests are activated when this statute of limitations is employed to preclude paternity suits. The state wants to avoid stale and fraudulent or spurious claims against a purported father, but it also wants children to be maintained from the resources of their natural parents so that the burden on the public welfare system, and thus the taxpayers will be lessened.
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> The only proper application of the statute of limitations to child support claims would be to those claims that have accrued in the past but which are not adjudicated. The state could properly say that a claim for child support not made within a certain time after it accrued is barred. However, since the duty of support continues throughout the minority of the child, new causes of action are being

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a right to back child support when the paternity proceeding is commenced after one year. Texas Family Code Section 13.42(a) provides that the alleged father who denies paternity may not be required to pay any child support until after paternity has been established.

> created each day that the natural father does not provide support. This duty of future support cannot be barred for illegitimate children if it is allowed for legitimate children.

State of Florida, Department of Health and Rehabilitative Services v. *West*, 378 So.2d 1220 (1979).[14] (Emphasis added).

In this context, the one-year time limit can best be understood as an attempt by an overwhelmingly male legislature, to limit the rights decreed by *Gomez*, out of a continuing desire to blame only the child and the mother for illegitimacy[15] and to limit the claims of illegitimate children against their fathers. For Texas to create a cause of action whom *Gomez* commands for Texas to create a cause of action in the mother, and then terminates that right of action when she delays beyond the one-year period, is inconsistent with the holding in *Gomez*. Such a delay by the mother constitutionally may justify terminating the mother's right to have the natural father contribute to the child's support; it cannot be grounds for terminating the *child's* right to support.

After the court ruled in Gomez, Texas did not establish a right to support *for the child* born out of wedlock. It created for the mother of such child an action for contribution by the father to their joint and several liability for the support of the

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[14] *See also, Stringer* v. *Dudoich*, 583 P.2d 462 (N.M. 1978) *Palmer* v. *Mangum*, 338 So.2d 1002 (Miss. 1976), *Huss* v. *DeMott* 524 P.2d 743 (Kan. 1974), *Kaus* v. *Sing Chawla*, 522 P.2d 1198 (Wash. Ct. App. 1974) all of which hold that limitations on paternity suits or child support suits by illegitimates are unconstitutional in their entirety or as they apply to illegtimate children.

[15] Historically mothers of illegitimate children have borne a greatly disproportionate share, compared to the fathers, of the stigma, condemnation, and punishment for parenting an illegitimate child, as well as of the obligation to support and nurture the child. See Vincent, "Teenage Unwed Mothers in American Society," XXII, No. 2 *The Journal of Social Issues* 22, 30-31 (April 1966); Krause, "Equal Protection for the Illegitimate," 65 *Mich. L.Rev.* 477 (1967); Secretary of the United Nations, *Report:* "The Status of the Unmarried Mother: Law and Practice" 56 (1971).

child. While the mother of an illegitimate child frequently has an obvious financial interest in obtaining support from the natural father, her interest is not necessarily co-extensive with the child's. The mother may delay prosecution when the father openly admits paternity and voluntarily provides support. It is understandable why she would hesitate to jeopardize their relationship and antagonize the father by bringing him into court. It is understandable, that is, from the mother's point of view. It is not, however, reasonable in terms of the child's interest and the constitutional mandate of *Gomez*[16] that illegitimate children themselves have the same rights to support from their fathers as legitimate children.

A child under one year of age is under an obvious disability and is unable to seek to have the required action initiated on his own behalf, as the Texas Supreme Court has otherwise recognized. *McCrary* v. *City of Odessa*, 482 S.W.2d 151 (Texas 1972). In those situations where the state is not the plaintiff, an illegitimate child's right to a paternity determination and support effectively is tied to the willingness and ability of the mother to assert those rights.[17] If the mother is unwilling or unable to pursue a paternity suit within one year, or fails to do so out of ignorance of the law, then the child's rights to sup-

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[16] While Texas ignores the child's right at the threshold of the action, ironically it has assured that once a suit is filed the child's interests are protected in case of conflict with the mother's interests:

> "The child must be a party to a settlement agreement with the alleged father. The child shall be represented in the settlement agreement by a guardian ad litem appointed by the court. The court must approve any settlement agreement, dismissal, or nonsuit." Section 13.07.

This recognition of conflicting interests is constitutionally inadequate because if the suit is barred by the one year statute, 13.07 provides no protection to an illegitimate child.

[17] While other persons may also bring suit on behalf of the illegitimate child pursuant to Texas Family Code, Section 11.03, if they have an interest in the child, it is uncommon for anyone other than the mother to bring suit unless the mother is receiving welfare benefits.

port vanish. In many cases the mother herself is a minor, who from ignorance or confusion or because of parental pressure will not bring suit. Most women, but particularly mothers who themselves are minors, will fear community disapproval or ostracism resulting from the public exposure of litigation and may therefore postpone a lawsuit. In some cases the interests of the mother do not coincide with those of the child, because the mother may be afraid that a paternity suit would alienate the father's affections. The mother may be lulled into inaction because she and the father are cohabitating and pooling their resources,[18] or because the father is supporting the child voluntarily. In either situation, the mother's incentive to sue is diminished, if not eliminated; but neither cohabitation or voluntary support tolls the statute of limitations at issue here. *Texas Department of Human Resources* v. *Hernandez*, 595 S.W.2d 189 (Tex. Civ. App. — Corpus Christi 1980 Ref. N.R.E.).

In other circumstances, the child may be living with the father alone during the first year(s) of the child's life,[19] and if the father then abandons the child, the child is left without a remedy.

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[18] Parents of illegitimate children often have long and stable relationships. *See, Herzog*, "Some Notes About Unmarried Fathers," 45 *Child Welfare* 194 (April 1966); Wessel, "A Physician Looks at Services for Unmarried Parents," 49 *Social Casework* 11 (1968); Chaskel, "Changing Patterns of Services for Unmarried Parents," 49 *Social Casework* 3 (1968); Sauber and Rubenstein, *Experiences of the Unwed Mother as a Parent* (1965); Pannor, Massarik & Evans, *The Unmarried Father* (1971); H. Pope; "Unmarried Mothers and Their Sex Partners," *Journal of Marriage and the Family* 555 (August, 1967).

[19] A significant percentage of illegitimate children live with their fathers rather than their mothers. U.S. Bureau of the Census, *U.S. Census of the Population 1970 — Vol. 1, Characteristics of the Population, Part 1 U.S. Summary — Section 2*, U.S. Government Printing Office, Washington, D.C. 1973, Table 206.

Frequently, the mother has insufficient resources during the first year of the child's life to prosecute a paternity/support action. She may be particularly reluctant to expend scarce resources on such a proceeding if the chance of getting any significant support is minimal because the father is indigent or very young or wholly unreliable.

A disproportionate number of illegitimate births occur to poor mothers. In 1973, 13.2 percent of all births were illegitimate. In the same year, 32.7 percent of the children receiving Aid to Families With Dependent Children (AFDC) were illegitimate. U.S. Printing Office, *Wage Garnishment, Attachment, and Establishment of Paternity,* Senate Committee on Finance, pp. 215-16 (1975). A significant proportion of other mothers of illegitimate children have low-incomes but are not receiving AFDC. Such women are not in a financial position to afford counsel to assert the children's rights. This is especially true during the children's first year because the woman may have incurred the medical expenses or loss or reduction of income as a result of the birth of the child.

Moreover, there may be compelling reasons for a woman not to commence a paternity action. Congress has in fact recognized that the mother has a right not to bring or cooperate with a paternity/support proceeding where there is "good cause." 42 U.S.C. § 602(a)(26)(B). Federal regulations recognize as good cause for the mother's failure to participate in establishing paternity and securing support when such participation reasonably can be anticipated to result in serious physical or emotional harm to the child or the mother. 45 C.F.R. § 232.42(a)(1). Federal law also recognizes that good cause for not bringing the action at one point in time may not exist at a later date and requires that a decision not to proceed with the paternity/support action be reviewed periodically at each redetermination of her welfare eligibility. 45 C.F.R. § 232.47.[20]

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[20] Good cause for non-cooperation suspends paternity/support proceedings unless the state determines that *it* can proceed without the mother's help and without endangering the mother or child. 45 C.F.R. § 232.49.

C. The discrimination and patent irrationality of the one-year statute of limitations are manifest in the "unique" evidentiary nature of paternity proceedings. *Little* v. *Streater*, U.S. ____, (1981) 49 L.W. 4581, 4583 (June 1, 1981). The function of a statute of limitations includes avoidance of situations in which testimony deteriorates over time as memories fade or documents disappear. Paternity proceeding are unique in every such proceeding does not deteriorate over time.[21] "Unlike other evidence that may be susceptible to varying interpretation or disparagement, blood test results, if obtained under proper conditions by qualified experts, are difficult to refute." *Little* v. *Streater*, 49 L.W. at 4583. Congress has recognized that in the ascertainment of paternity, the reliability of blood and unrelated tests is extremely high, contrary to many popular misconceptions. Sen.R. 93-1356 reprinted in [1974] U.S. Code Cong. and Admin. News 8155-56. The Senate Finance Committee stated:

> In taking the position that a child born out of wedlock has a right to have its paternity ascertained in a fair and efficient manner, the [C]ommittee acknowledges that legislation must recognize the interest primarily at stake in the paternity action to be that of the child . . . The Committee is convinced that . . . paternity can be ascertained with reasonable assurance, particularly through the use of scientifically conducted blood typing. S.Rep. No. 93-1356, 93d Cong., 2d Sess. 52 (1974), quoted in *Little* v. *Streater*, 49 L.W. at 4585 n.9.

In *Little* v. *Streater*, 49 L.W. at 4583, this Court also noted the joint American Medical Association — American Bar Association 1976 Guidelines recommending the use of a set of seven blood test "systems" that are "reasonable" in cost and provide a 91% cumulative probability of negating paternity for erroneously accused Black and 93% for Caucasian men. See also, "Using Blood Tests to Establish Paternity," Center for

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[21] Paternity proceedings are also unique in that the two crucial witnesses are either parties to the suit or required witnesses.

Policy Research, Inc., Office of Child Support Enforcement, D.H.E.W. Report, 1977.

Even the AMA-ABA Guidelines understate the quality of exclusion achievable by modern blood testing and genetic testing. Under the current state of the art, tests are available which will exclude up to 99% of all possible non-fathers. "Resolution by HLA Testing of 1,000 paternity cases not excluded by ABO Testing," Paul I. Terasaki, 16 *Journal of Family Law* 543 (1978); "Paternity Testing: A Current Approach," Michael B. Stroud, et al., *Trial*, September 1980, 46.

Current tests not only reflect exclusion with very high probabilities of accuracy, but also can reflect that the claim of paternity is correct with similarly great accuracy. Human Leukocyte Antigen ("HLA") testing is the testing of antigens on white blood cells. The presence or absence of certain antigens is genetically controlled. Since a child receives one-half of his genes from its mother and the other half from its natural or biological father, the child's genetic makeup must match, in part, the genetic makeup of the true father. HLA testing can determine this genetic makeup.

The patterns of genetic makeup that are obtained from the alleged father and illegitimate child are then evaluated utilizing well-defined laws of inheritance to establish whether or not the genetic makeup of the alleged father would preclude his being the true father of the child in question. If the genetic makeup of each does not in part match, then the alleged father is completely excluded as being the possible father of the illegitimate child. With HLA testing the exclusion rate is routinely 95-98 percent, *Stroud, supra* at 46, and can be higher.

> [Of the nonexclusion cases] 67% had a probability of paternity of more than 95% and 86% were greater than 90% probability of paternity. As many as 16% of the cases tested had probabilities greater than 99% . . . Thus, *when a given putative father is not excluded, the unique feature of HLA testing is that such nonexcluded males can be assigned a high probability of paternity.* (Emphasis added.)

"Resolution by HLA Testing of 1,000 paternity cases not excluded by ABO Testing" Paul I. Terasaki, 16 *Journal of*

Family Law 543 (1978). *See also,* Krause, *Illegitimacy, Law and Social Policy,* at pp. 123-28, 138; Keiter, "Advances in Anthropological Paternity Testing," 21 *Am. J. Phys. Anthropology* 81 (1963)(99.73 plus probability in 19 out of 20 cases).

The interests of the state, and those of the alleged father, to prevent incorrect claims of paternity are thus protected by the recent advance in blood and genetic testing. Modern tests virtually are capable of proving and disproving paternity; such evidence lasts forever, and in contrast to the subjective evidence upon which paternity has been proven in the past, such tests provide highly objective scientific evidence of who the actual, biological father is, or exclude 95%-100%[22] of the falsely accused fathers.

Texas, in the same law that created the one-year statute of limitations, recognized the central role of blood tests in paternity cases. The court is required to order blood tests for the mother, father and child, Section 13.02(a); to appoint experts to make such tests, Section 13.03(a); and to require fees to be paid by the state welfare department if it is a party, Section 13.03(b). The results of the tests alone can be a basis for dismissal of a paternity action, Section 13.05(a), and are otherwise admissible at trial, Section 13.06.

D. Finally the limitation period of Section 13.01 is not "carefully tuned," to alternative state interests, interests that *Mathews* v. *Lucas* 427 U.S. 495 (1976) and *Lalli* v. *Lalli* 439 U.S. 259 (1978) stated must be recognized. The Texas Family Code, Sections 14.05, 12.05(3), and Chapter 13 are all directed at providing support to dependent children. Yet Section 13.01 by its limitation defeats this purpose for illegitimate children after they reach the age of one year. The primary purpose of Chapter 13 Subchapter A is to provide support for illegitimate children, yet the time limit of § 13.01 is not directed

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[22] Dr. Terasaki states that 100% exclusion rates are now possible by testing very rare antigens but that the expense of such tests are currently prohibitive. Terisaki 16 *Journal of Family Law* pg. 545 supra.

to this purpose. This provision terminates the child's rights based merely on the passage of a certain amount of time and has no logical connections with who is the actual father, the availability of proof of paternity, or the needs of the child.

Second, the state has the interest in ensuring that the primary obligation for the support of a child falls on both natural parents, rather than on the taxpayers of the State, *See, Texas Department of Human Resources* v. *Delley* 581 S.W.2d 519 (Tex. Civ. App.-Dallas 1979 Ref. N.R.E.). A disproportionate number of illegitimate children are born to poor mothers, approximately 1 out of 3 in 1973. *See,* p. 27 *supra.* The interest of the taxpayers in keeping these children off the welfare roll is substantial. Yet § 13.01 frustrates this purpose.

The operation of the one year limitation period under Texas Family Code § 13.01 thus runs directly counter to both of these state interests. By requiring that support rights for illegitimate children be conditioned upon satisfying this one year period, Section 13.01 subordinates the welfare of the children and the reduction of the taxpayers' burden to the prevention of allegedly stale and fraudulent claims of parentage.

The Texas classification thus is not rationally related to any legitimate state purpose. Certainly, under the more stringent standards of review that should be applied here, no justification exists for the distinction by legitimacy of issue; the critical link between classification and valid state purpose cannot be forged. At the same time, the statute at issue affirmatively undermines ancillary state functions, including the imposition of support obligations. Nevertheless, Texas has arbitrarily erected barriers based on the status of legitimacy of birth, excluding children from support rights solely because they are born "illegitimate." The Equal Protection Clause of the Fourteenth Amendment prohibits that result. It is offensive to the beneficent command contained in the phrase equal protection of laws — that like be treated alike — which forbids invidious discrimination of the type contained in the Family Code. It is, as this Court has so frequently recognized, "illogical and

unjust" to wreak the perceived sins of the parents on the head of an innocent child. *See, Weber,* 406 U.S. at 175-176.

IV. Texas Statutory Scheme By Which Illegitimate Children Must Enforce Their Support Rights, As Applied Here, Deprives Appellant Of His Right To Due Process Of Law Under The Fourteenth Amendment.

The constitutional right that *Gomez* conferred upon illegitimate children was the "judicially enforceable right . . . to needed support from their natural fathers," *Gomez,* 409 U.S. at 538, when the state had also posited the same right for legitimate children. Texas had created that right for legitimate children prior to *Gomez,* and after *Gomez,* it purported to do so for illegitimate children as well. See p. 17, *supra.*

The right to support is one akin to those rights that this Court consistently has recognized as property interests that the due process clause of the Fourteenth Amendment protects. *See, Sniadach* v. *Family Finance Corporation,* 395 U.S. 337 (1969), *Goldberg* v. *Kelly,* 397 U.S. 254 (1970), *Mullane* v. *Central Hanover Trust Co.,* 339 U.S. 306 (1950). What the due process clause consequently requires, however, is something more than Texas' statutory scheme for enforcement of the support right — incorporated in Section 13.01-13.09 of Title II — affords. Section 13.01, requiring that paternity suits be brought within one year of a child's birth, when read in statutory context, in fact so burdens the exercise of that support right as to deprive illegitimate children, including appellant here, of their rights under the due process clause of the Fourteenth Amendment.

A. The statutory scheme by which illegitimate children in Texas must enforce their right to support from their natural fathers carries with it two correlative defects making it constitutionally infirm. The first is the one year statute of limitations on paternity actions incorporated in Section 13.01; the second is the absence of any procedure affording a reasonable opportunity for a suit to be brought on the minor's behalf within this period, or for a suitable representative of the

minor, with presumptive knowledge of the limitations period and the significance of the paternity action, to decide nonetheless not to file such a suit. The result, nowhere better shown than in this case, is that an illegitimate child may be barred from pursuing his paternity (and thus support) claim when there has been no constitutionally meaningful opportunity for that child or its representative to be heard on this claim at all. *See, Armstrong* v. *Manzo,* 380 U.S. 545 (1965).

The decisions of this Court compel this conclusion. A fundamental requirement of due process is the "opportunity to be heard." *Grannis* v. *Ordean,* 234 U.S. 385 (1914). "It is an opportunity which must be granted at a meaningful time *and in a meaningful manner." Armstrong* v. *Manzo,* 380 U.S. 545 (1965) (emphasis added). To be meaningful, that opportunity must involve at least some notice of a threatened deprivation of interests that due process protects, *Memphis Light, Gas & Water Division* v. *Cratt* 436 U.S. 1 (1978); *Goldberg* v. *Kelly,* 397 U.S. 290 (1970); *Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950). The procedures governing the initiation and the conduct of any hearing must also be sufficient to ensure a litigant a fair opportunity to present his claim of entitlement (or continued entitlement) to the interests that due process protects. *Memphis Light, Gas & Water Division, supra; Mathews* v. *Eldridge,* 424 U.S. 319 (1976). Moreover, where "persons [are] forced to settle their claims of right and duty through judicial process," *Boddie* v. *Connecticut,* 401 U.S. 371, 377 (1971), the government may be required to facilitate such individuals' access to the judicial process. *Id.* (State required to pay filing fees for indigents in divorce proceedings.)

Here, the opportunity the illegitimate child has to have his paternity/support claim heard simply is not "meaningful" under any understanding of that term permitted by this Court's decisions. In Section 13.01, Texas says that the illegitimate child may enforce his support right only by a paternity suit filed within one year of his birth. But the infant himself is without the ability to assert this right, which *Gomez* conferred

upon *him*. Texas therefore must be understood to have delegated to some other party the responsibility to assert the child's right[23] — and to waive it as well if the paternity suit is not filed within one year of the child's birth.[24] In the usual case, however, the only individual (other than the illegitimate child) who may have a personal interest in establishing paternity is the child's mother.[25] But Texas does not give the

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[23] Texas Rules of Civil Procedure Rule 44 (1981) provides:

Minors, lunatics, idiots, or persons non compos mentis who have no legal guardian may sue and be represented by "next friend" under the following rules:

(1) Such next friend shall have the same rights concerning such suits as guardians have, but shall give security for costs, or affidavits in lieu thereof, when required.

(2) Such next friend or his attorney of record may with the approval of the court compromise suits and agree to judgments, and such judgments, agreements and compromises, when approved by the court, shall be forever binding and conclusive upon the party plaintiff in such suit.

[24] Such a delegation may not, of itself, violate due process. In any case, petitioner here does not assert that it does. This Court thus need not reach the question of whether the due process clause requires that the one year statute for filing paternity suits be tolled during the entire period of a child's minority. That the claim of a legitimate child to support is tolled during his minority, but the claim of an illegitimate child is not, is, however, implicated in the equal protection claim appellant advances here.

[25] In some cases, of course, the interest of the mother may conflict with those of the child, or at least not be congruent with its interest. Thus, while the mother may have interests in securing child support if she is caring for her illegitimate child, this interest may be insubstantial if she is not in fact caring for him. Moreover, the mother may fear to bring a paternity action against the father, for fear of retaliation against her, physical or otherwise. Congress has in fact recognized that there may be "good cause" for the mother to refuse to seek a paternity adjudication and support from the father for her minor children. 42 U.S.C. § 602(a)(26)(B). See pp. 27-28, *supra*.

mother notice of the consequences of failing to file such a suit within one year, even though it would be easy — by a simple notice on all birth certificates for example — for it to do so. Nor is there, in instances in which the mother is aware of the one year statute and wishes to file suit on her child's behalf, any mechanism for ensuring that she will be able to do so — even though here, as in *Boddie* v. *Connecticut*, 401 U.S. 371 (1971), the claim at issue, the right to support, is one that must be settled through the judicial process.

The state, to be sure, also has an interest in securing paternal support for the illegitimate child, if only because of the possibility that if child support is not secured, the child may become a public charge. *See, Dandridge* v. *Williams*, 397 U.S. 471 (1970). Indeed, Title IV-D of the Social Security Act, 42 U.S.C. § 654(4)(1980), *requires* the state to "establish the paternity" of every child eligible for AFDC. *Id.* See pp. 15-16, *supra*. For illegitimate children whose mothers apply for AFDC within one year after their birth, this statutory procedure may normally meet the constitutional requirements of a meaningful opportunity to be heard on their paternity and support claims, assuming the state acts properly. *But, see, Logan* v. *Zimmerman Brush Co.*, 82 Ill. 2d 99, 411 N.E. 2d 277 (1980), *prob. juris.* noted 101 S.Ct. 1345, (1981). The problem, of course, is that there is no reasonable assurance that any individual illegitimate child will be eligible for AFDC within one year of his birth, or, if he is, that his mother will apply on his behalf, thus triggering the state's obligation to "establish paternity" on the child's behalf. 42 U.S.C. § 654. In this case, indeed, appellant's mother did apply for AFDC on his behalf, and assigned his support rights to the state, but not until June, 1978, more than a year after his birth. The state nonetheless brought a paternity suit on appellant's brief, in October, 1978; and it was that suit that was dismissed pursuant to Section 13.01.

In sum, Texas has established a procedure for judicial enforcement of illegitimate children's right to support from their natural fathers. Under that procedure the right to support is

lost without notice of the one year statute of limitations. Because of the absence of notice, both interested individuals and the state may be deprived of a reasonable opportunity to file the paternity suit within that period. That procedure cannot withstand constitutional scrutiny. The opportunity to be heard "in a meaningful manner," *Armstrong* v. *Manzo*,1 380 U.S. 545, 552 (1965) requires more, at least where the individual whose due process rights are at stake is an infant child incapable of protecting his own interests. It requires notice of the one year statute of limitations on paternity actions to a presumptively suitable representative of the illegitimate infant and notice that the failure to establish paternity extinguishes the support claim from his natural father. If such a notice is given, then the representative can make a knowing decision about whether to pursue the infant's support claim. *See, Memphis Light, Gas & Water Division* v. *Cratt*, 436 U.S. 1 (1978), *Goldberg* v. *Kelly*, 397 U.S. 290 (1970). And if due process requires that there be some minimally fair procedure to ensure the *effective* assertion of that claim, *see Matthews* v. *Eldridge*, 424 U.S. 319 (1976), *Boddie* v. *Connecticut*, 401 U.S. 377 (1971), it requires as well a procedure that, unlike the one here, provides a realistic opportunity for the claim to be heard on its merits.

Nor is the statutory scheme at issue, as applied here, any less constitutionally infirm because the statutory grant of support to illegitimate children is accompanied by a statutory limitation on "the procedures . . . to be employed in determining that right . . ." *Arnett* v. *Kennedy*, 416 U.S. 134 (1974) (Rehnquist, J. for himself and Burger, C. J. and Stewart, J.). In *Arnett*, the plurality opinion expressed the view that, in this circumstance, a litigant claiming the substantive right cannot be heard to complain about the accompanying procedures. *Arnett*, 416 U.S. at 154. But the majority of this Court expressed the contrary position. As Justice Powell stated:

> The plurality would thus conclude that the statute . . . determined not only the nature of appellee's property interest, but also the extent of the procedural [due process] protections to which he may lay claim. . . . This view mis-

> conceives the origin of the right to procedural due process. That right is conferred not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in federal employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards. As our cases have consistently recognized, the adequacy of statutory procedures for deprivation of a statutorily created right must be analyzed in constitutional terms.

Arnett, 416 U.S. at 167 (Powell, J. concurring)(footnotes ommitted). See also, *Arnett*, 416 U.S. at 177-78 (White, J. concurring and dissenting) and 216-217 (Marshall, J. dissenting). In any case, unlike the government job at issue in *Arnett*, which was in no way "created by the Constitution," *Arnett* v. *Kennedy*, 416 U.S. 134, 151, quoting *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972), the right of illegitimates to support from their natural fathers is grounded in the Constitution, *Gomez* v. *Perez*, 409 U.S. 535 (1973), if given form by Texas state law. Texas was required by the Constitution to effectuate that right; it failed to do so in a manner consistent with the requirements of the due process clause.

CONCLUSION

The judgment of the Texas Court of Civil Appeals, Thirteenth Supreme Judicial District, insofar as its affirming the trial court's dismissal of Appellant Original Petition, should be reversed.

Respectfully submitted,

MICHAEL S. MANKINS
COASTAL BEND LEGAL SERVICES
117 W. Sinton Street
Sinton, Texas 78387
(512) 364-3805
Attorney for Appellant

APPENDIX

STATUTORY APPENDIX

VERBATIM FEDERAL AND TEXAS STATUTES AND PROVISIONS

Statutes

1) Federal

45 C.F.R. § 232.42 (a)(1) Good cause circumstances . 26

(a) Circumstances under which cooperation may be "against the best interests of the child." The plan shall provide that the State or local agency will determine that cooperation in establishing paternity and securing support is against the best interests of the child only if:

(1) The applicant's recipient's cooperation in establishing paternity or securing support is reasonably anticipated to result in:

(i) Physical harm to the child for whom support is to be sought;

(ii) Emotional harm to the child for whom support is to be sought;

(iii) Physical harm to the parent or caretaker relative with whom the child is living which reduces such person's capacity to care for the child adequately;

(iv) Emotional harm to the parent or caretaker relative with whom the child is living, of such nature or degree that it reduces such person's capacity to care for the child adequately.

45 C.F.R. § 232.47 Periodic review of good cause determination 26

The plan shall provide that the State or local agency will:

(a) Periodically review, not less frequently than at each redetermination of eligibility required by § 206.10 (a)(9) of this chapter, those cases in which the agency has determined that good cause exists based on a circumstance that is subject to change; and

(b) If it determines that circumstances have changed such that good cause no longer exists, it will rescind its findings and proceed to enforce the requirements of §232.12 of this chapter.

45 C.F.R. § 232.49 Enforcement without the caretaker's cooperation 26

The State plan may provide that:

(a) If the State or local agency makes a determination that good cause exists it will also make a determination of whether or not child support enforcement could proceed without risk of harm to the child or caretaker relative if the enforcement or collection activities did not involve their participation.

(b) This determination will be in writing, contain the agency's findings and basis for determination, and be entered into the AFDC case record;

(c) If the IV-A agency excuses cooperation but determines that the IV-D agency may proceed to establish paternity or enforce support, it will notify the applicant or recipient to enable such individual to withdraw their application for assistance or have the case closed; and

(d) Prior to making a determination under this paragraph, the State or local agency will afford the IV-D agency an opportunity to review and comment on the findings and basis for the proposed determination and consider any recommendation from the IV-D agency.

42 U.S.C. § 602 (a)(26)(B) State plans for aid and services to needy families with children; contents; approval by Secretary 14, 15, 26, 33

(26) provide that, as a condition of eligibility for aid, each applicant or recipient will be required . . .

(B) to cooperate with the State (i) in establishing the paternity of a child born out of wedlock with respect to whom aid is claimed, and (ii) in obtaining support payments for such

applicant and for a child with respect to whom such aid is claimed, or in obtaining any other payments or property due such applicant or such child, unless (in either case) such applicant or recipient is found to have good cause for refusing to cooperate as determined by the State agency in accordance with standards prescribed by the Secretary, which standards shall take into consideration the best interests of the child on whose behalf aid is claimed; and that, if the relative with whom a child is living is found to be ineligible because of failure to comply with the requirements of subparagraphs (A) and (B) of this paragraph, and aid for which such child is eligible will be provided in the form or protective payments as described in section 406(b)(2) (without regard to subparagraphs (A) through (E) of such section);

42 U.S.C. §654(4)(6) State plan for child support .. 15, 34

(4) provide that such State will undertake . . .

(6) provide that (A) the child support collection or paternity determination services established under the plan shall be made available to any individual not otherwise eligible for such services upon application filed by such individual with the State, (B) an application fee for furnishing such services may be imposed, except that the amount of any such application fee shall be reasonable, as determined under regulations of the Secretary, and (C) any costs in excess of the fee so imposed may be collected from such individual by deducting such costs from the amount of any recovery made;

2) State

V.T.C.A., TEX. FAM. CODE Section 11.03 Whom May Bring Suit 24

A suit affecting the parent-child relationship may be brought by any person with an interest in the child, including the child (through a representative authorized by the court), any agency of the state or of a political subdivision of the state, and any authorized agency.

V.T.C.A., TEX. FAM. CODE Section 11.08(c) Contents of Petition 21

(c) The petition and other matters in a suit in which a determination of paternity is sought, if the petitioner is a person other than the alleged father of the child, are confidential, and the district clerk and employees of the clerk may not disclose to any person other than the court, the department, or the party to the suit any matter concerning the suit. The subsection does not apply if and when the suit is set for trial under Subsection (b) of Section 13.03 of this code.

V.T.C.A., TEX. FAM. CODE Section 12.02(a)(b) (1979) Relation of Child to Father 6

(a) A child is the legitimate child of this father if the child is born or conceived before or during the marriage of his father and mother.

(b) A child is the legitimate child of his father if at any time his mother and father have attempted to marry in apparent compliance with the laws of this state or another state or nation, although the attempted marriage is or might be declared void, and the child is born or conceived before or during the attempted marriage.

V.T.C.A., TEX. FAM. CODE Section 12.04 Rights, Privileges, Duties, and Powers of Parent 4, 8, 16

Except as otherwise provided by judicial order or by an affidavit of relinquishment of parental rights executed under Section 15.03 of this code, the parent of a child has the following rights, privileges, duties, and powers:

(1) the right to have physical possession of the child and to establish its legal domicile;

(2) the duty of care, control, protection, moral and religious training, and reasonable discipline of the child;

(3) the duty to support the child, including providing the child with clothing, food, shelter, medical care, and education;

(4) the duty to manage the estate of the child, except when a guardian of the estate has been appointed;

(5) the right to the services and earnings of the child;

(6) the power to consent to marriage, to enlistment in the armed forces of the United States, and to medical, psychiatric, and surgical treatment;

(7) the power to represent the child in legal action and to make other decisions of substantial legal significance concerning the child;

(8) the power to receive and give receipt for payments for the support of the child and to hold or disburse any funds for the benefit of the child;

(9) the right to inherit from and through the child; and

(10) any other right, privilege, duty, or power existing between a parent and child by virtue of law.

V.T.C.A., TEX. FAM. CODE Section 12.05 Rights of a Living Child After an Abortion or Premature Birth 29

(a) A living human child born alive after an abortion or premature birth is entitled to the same rights, powers, and privileges as are granted by the laws of this state to any other child born alive after the normal gestation period.

(b) In this code, "born alive" means the complete expulsion or extraction from its mother of a product of conception, irrespective of the duration of pregnancy, which, after such separation, breathes or shows any other evidence of life such as beating of the heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, whether or not the umbilical cord has been cut or the placenta is attached; each product of such a birth is considered born alive.

V.T.C.A., TEX. FAM. CODE Section 13.01 (1975) Time Limitation of Suit ..... *passim*

A suit to establish the parent-child relationship between a child who is not the legitimate child of a man and the child's natural father by proof of paternity must be brought before the child is one year old, or the suit is barred.

V.T.C.A., TEX. FAM. CODE Section 13.02(a)(b) Pretrial Proceedings: Blood Tests 21, 29

(a) When the respondent appears in a paternity suit, the court shall order the mother, alleged father, and child to submit to the taking of blood for the purpose of one or more blood tests. If the appearance is before the birth of the child, the court shall order the taking of blood to be made as soon as medically practical after the birth.

(b) An order issued under this section is enforceable by contempt, except that if the petitioner is the mother or the alleged father and refused to submit to the blood test, the court shall dismiss the suit. If the respondent is the mother or the alleged father and refused to submit to the blood test, the fact of refusal may be introduced as evidence as provided in Section 13.06(d) of this code.

V.T.C.A., TEX. FAM. CODE Section 13.03(a)(b) Pretrial Proceedings: Appointment of Experts ... 29

(a) The court may appoint one or more experts qualified as examiners of blood types to make the blood tests. The court may determine the number and qualifications of the experts and shall prescribe the arrangements for conducting the tests.

(b) The court may fix a reasonable fee for each court-appointed examiner and may require the fee to be paid by any or all of the parties or by the Texas Department of Human Resources, if the department is a party of the suit, in the amounts and in the manner directed, or the court may tax all or part or none of the fee as costs in the suit.

V.T.C.A., TEX. FAM. CODE Section 13.05(a) Pretrial Proceedings: Effect of Blood Tests 8, 29

(a) At the conclusion of the pretrial conference, if the court finds that the tests show by clear and convincing evidence that the alleged father is not the father of the child, the court shall dismiss the suit with prejudice.

V.T.C.A., TEX. FAM. CODE Section 13.06 Evidence at Trial 29

(a) Unless otherwise permitted by the court on a showing of good cause, a party may call to testify on the results of the blood tests only those experts who testified at the pretrial conference.

(b) A witness called by a party at the trial is that party's witness.

(c) If the blood tests show the possibility of the alleged father's paternity, the court may admit this evidence if offered at the trial.

(d) Evidence of a refusal by the respondent to submit to a blood test is admissible to show only that the alleged father is not precluded from being the father of the child.

V.T.C.A., TEX. FAM. CODE Section 13.07 Settlement 24

The child must be a party to a settlement agreement with the alleged father. The child shall be represented in the settlement agreement by a guardian ad litem appointed by the court. The court must approve any settlement agreement, dismissal, or nonsuit.

V.T.C.A., TEX. FAM. CODE Section 13.41 Venue .. 21

(a) If the alleged father is not the petitioner, the suit shall be brought in the county where the alleged father resides, except that if the alleged father is not a resident or domiciliary of this state and jurisdiction is to be established as provided by Section 11.051 of this code, the suit shall be brought where the mother resides.

(b) If the alleged father is the petitioner, the suit shall be brought in the county where the mother resides, except that if the mother is not a domiciliary of this state and jurisdiction is to be established as provided by Section 11.051 of this code, the suit shall be brought where the child resides.

V.T.C.A., TEX. FAM. CODE Section 13.42(a) Conservatorship, Support, Fees, and Payments 22

(a) In a suit in which a determination of paternity is sought, the court may provide for the Managing and possessory conservatorship and support of and access to the child; except that no alleged father denying paternity may be required to make any payment for the support of the child until paternity is established.

V.T.C.A., TEX. FAM. CODE Section 14.05(a)(b) Support of Child 4, 16, 29

(a) The court may order either or both parents to make periodic payments or a lump-sum payment, or both, for the support of the child until he is 18 years of age in the manner and to the persons specified by the court in the decree. In addition, the court may order a parent obligated to support a child to set aside property to be administered for the support of the child in the manner and by the persons specified by the court in the decree.

(b) If the court finds that the child, whether institutionalized or not, requires continuous care and personal supervision because of a mental or physical disability and will not be able to support himself, the court may order that payments for the support of the child shall be continued after the 18th birthday and extended for an indefinite period.

TEX. REV. CIV. STAT. ANN. Article 5535 (1968) Person Under Disability 16

If a person entitled to bring any action mentioned in this subdivision of this title be at the time the cause of action accrues either a minor, a married person under twenty-one years of age, a person imprisoned or a portion of the time limited for the commencement of the action and such person shall have the same time after the removal of his disability that is allowed to others by the provisions of this title.

Vernon's Ann. Rules Civ. Pro. Rule 44 (1981) May Appear by Next Friend 33

Minors, lunatics, idiots, or persons non compos mentis who have no legal guardian may sue and be represented by "next friend" under the following rules:

(1) Such next friend shall have the same rights concerning such suits as guardians have, but shall give security for costs, or affidavits in lieu thereof, when required.

(2) Such next friend or his attorney of record may with the approval of the court compromise suits and agree to judgments, and such judgments, agreements and compromises, when approved by the court, shall be forever binding and conclusive upon the party plantiff in such suit.

Texas Const. Art. I, Section 16 (1955) Bills of attainder; ex post facto or retroactive laws; impairing obligation of contracts 3

Sec. 16. No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made.

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NO. 80-6298

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

LOIS MAE MILLS,
IN THE INTEREST OF
ARCHIE BURTON DUNCAN,
A CHILD, APPELLANT,

v.

DAN HABLUETZEL, Appellee.

APPEAL FROM THE COURT OF CIVIL APPEALS OF TEXAS

APPELLEE'S BRIEF ON THE MERITS

STATEMENT OF THE CASE

Appellee agrees with and adopts the Statement of the Case as set forth in Appellant's Brief on the Merits except to the extent that it refers to pleadings which were not in fact filed. Appellant

represents that she claimed violation of the Fourteenth Amendment of the United States Constitution in an objection to the motion to dismiss in the trial court. (App. Brief 3). No such objection appears of record (J.A. 2-10) and there was no Transcript or Statement of Facts forwarded on appeal which would substantiate that objection was made in open Court. The rights of Appellant under the United States Constitution were raised for the first time on appeal.

SUMMARY OF THE ARGUMENT

I.

ENLARGEMENT OF THE TEXAS PATERNITY STATUTE FROM ONE YEAR TO FOUR YEARS

The Regular Session of the Sixty-Seventh Legislature, State of Texas, in 1981, amended Section 13.01, Texas Family Code, to enlarge the time for filing suit to establish paternity from one year

to four years, such new law to be effective September 1, 1981. Appellant takes the position that such action cannot and does not affect this case because the Texas Constitution Article I, Section 16 prohibits ex post facto or retroactive laws, citing Southern Pacific Transport Company v. State, 380 S.W. 2d (Tex. Civ. App. Hous, 1964, writ ref.)

Appellee agrees that the Texas Constitution so provides, but disagrees that such Constitutional provision prohibition is applicable in the case. The Texas Courts have, in recent years, differentiated between "substantive laws" to which such constitutional prohibition is applicable and "procedural or remedial laws" which are outside the constitutional prohibition. The Courts in the State of Texas are now holding that statutes relating to procedure or remedies do not fall within the constitutional prohibition against retroactive application of legislative enactments. Exxon

Corporation v. Brecheen, 526 S.W. 2d 519 (S. Ct. Tex 1975) Texas Dept. of Human Resouces vs. Chapman 570 2d 46 (CCA - Dal. 1978, Ref. N.R.E.)

Inasmuch as the recent action of the Texas Legislature pertains to a remedy or procedural matter, i.e., an enlargement of the time within which to establish paternity, it would appear that this appeal is affected and that perhaps the appeal is moot.

II.

EQUAL PROTECTION

Prior to the enactment of Article 13.01, Texas Family Code, effective September 1, 1975, Texas did not afford an illegitimate child an avenue, procedure or vehicle by which to establish paternity so that child support laws could be enforced against the biological father. The action taken by the 64th Legislature of Texas in 1975 was

pursuant to mandate in Gomez vs. Perez, 409 U.S. 535, 93 S. Ct. 872 (1973) which held that ... "once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother."

Article 13.01 is attacked as denying child support to an illegitimate. Art. 13.01 is not a support statute. The support statutes under the Texas Family Code are: Article 12.04, 14.05, and 13.42, to which children born out of wedlock cannot avail themselves until they have established the proper male from whom to seek support.

Equal protection to support is not denied an illegitimate. Once an illegitimate has established the proper person from whom to seek support, within the time and method prescribed by law, that child

is on equal footing and is given equal remedies for establishing child support (Article 13.42 (a), Texas Family Code) and for the enforcement thereof (Title II, Subtitle A, Chapter 14, Texas Family Code).

III.

DUE PROCESS

An attack on the subject section of the Texas Family Code on the grounds of deprivation of due process necessitates the inquiry: which due process? It is difficult to determine if the attack is toward substantive procedural, judicial or legislative due process. The two correlative defects referred to in Appellant's Brief (App. Brief 31) relate to the one year statute itself and the absence of any procedure affording a reasonable opportunity for a suit to be brought on the minor's behalf within this period or for

a suitable representative... to file suit.

The latter is simply not a correct reflection of the law or of the coordinated format of the Texas Family Code. The latter is divided into three Titles: Title I. Husband and Wife; Title II. Parent and Child; and Title III. Delinquent Children and Children in Need of Supervision.

Title II has three Subtitles, the first of which is Subtitle A: The Parent-Child relationship and the suit affecting the Parent-Child relationship. Under Subtitle A are seven (7) chapters, Chapters 11 through 17, all of which relate to the parent-child relationship:

Chapter 11. General Provisions

Chapter 12. The Parent-Child Relationship

Chapter 13. Determination of Paternity

Chapter 14. Conservatorship, Possession and Support of Children

Straight away in Section 11.03 (Chapter 11) the Texas Legislature makes provision for Who May Bring Suit as follows:

> "A suit affecting the parent-child relationship may be brought by any person with an interest in the child, including the child (through a representative authorized by the Court), any agency of the state or of a political subdivision of the state and any authorized agency."

Therefore, any argument that there is no one to represent the child other than the child's mother is without merit and lack of procedural due process should not attach.

If no person or entity authorized to act on behalf of the child takes the required action within the required period, it is not the State that has barred the way.

Regarding the imposition, by the 64th Texas Legislature in 1975, of a one-year statute of limitation, both the United States Supreme Court and the Texas Supreme Court have taken the posi-

tions that their roles are not to hypothesize independently on the desireability or feasibility of any possible alternative. Mathews vs. Lucas, 96 S. Ct. 2755, 427 U. S. 495, (1976) Texas Department of Human Resources v. Chapman 570 S. W. 2d 46 (CCA-Dal, 1978 Ref. N.R.E.), Williams v. Luckey 599 S. W. 2d 108 (CCA-Dal, 1980, Ref. N.R.E.)

In the Chapman case, the Court stated: ..."It has long been held that the legislature, not the courts, is entrusted with the responsiblity of considering the public interest of this state regarding limitation of action." (P. 49) and again, at page 49: ..."With respect to paternity actions, the legislative discretion is not subject to judicial review unless the prescribed period is so short as to be tantamount to the "impenetrable barrier" proscribed in Gomez (supra). A one-year limitation is not insurmountably brief, and

although the forfeited right is important, this court is not empowered to invalidate legislative enactments based on our own policy concepts of what a reasonable time would be."

ARGUMENT

ENLARGEMENT OF THE TEXAS PATERNITY STATUTE FROM ONE YEAR TO FOUR YEARS

Now that the Texas Legislature has enlarged the time within which to file suit to establish paternity from one year to four years, the question arises: May the law be applied retroactively so that children born after September 1, 1977, benefit?

So far as the Appellee is concerned, whether the answer is yes or no, he would not be affected individually since the Appellant's child was born February 12, 1977, and both the one year and four year limitations have run.

It is the general rule in Texas that after a cause has become barred by the statute of limitation,

the defendant has a vested right to rely on such statute as a defense. Mellinger v. City of Houston, 3 S. W. 249 (Tex. S. Ct. 1887), Wilson v. Work, 62 S. W. 2d 490 (Tex. S. Ct. 1933), Article 1, Section 16, Texas Constitution.

However, if the Court finds that such legislative enactment is procedural or remedial in nature, then the enactments do not fall within the constitutional prohibition. Exxon Corporation v. Brecheen, 526 S. W. 2d 519 (Texas S. Ct. 1975, reversing 519 S. W. 2d 17 - on other grounds), Regal Properties v. Donovitz, 479 S. W. 2d 748 (Tex. CCA-Dal, 1972, Ref. N.R.E.), Holt v. Wheeler, 301 S. W. 2d 678 (Tex. CCA-Gal, 1957, writ dismissed).

And, in Texas, the intention of the Legislature is looked to by the Courts when they are attempted to determine if the enactment is to be given retroactive effect. Merchants Fast Motor Lines, Inc., et al v. Railroad Commission of Texas, 573 S. W.

2d 502 (Tex. S. Ct. 1978)

Senate Bill No. 105 was the legislative enactment by which the Texas paternity statute was amended. (App. 1a) It also included changes in the Texas Probate Code and the Texas Code of Criminal Procedure, and gives precise instructions concerning the time the latter changes are to be given effect. No specific mention is made to the change in Section 13.01, Texas Family Code and it is the opinion of the Appellee that the Texas Legislature intended for such enactment to become the law of the State on September 1, 1981, with all children born subsequent to September 1, 1977, to be covered or protected. When procedural statutes are involved, it is settled that the Legislature may make changes applicable to future steps in pending cases. Phil H. Pierce Co. v. Watkins 263 S. W. 905 (Tex. S. Ct. 1924) The Texas courts reason that a litigant has not vested right in

a procedural remedy and remedial statutes are valid and control litigation from the date they become law. Pierce v. Watkins (supra).

Cases decided in Texas which have held that legislative enactments are remedial in nature and therefore may be given retroactive effect as well as prospective effect include:

> Change of time for filing motion for new trial from 3 days to 10 days. Texas Supreme Court held new change was applicable to judgment entered June 28, 1923, even though law became effective July 1, 1923. Phil H. Pierce v. Watkins (supra)
>
> In sustaining a plea of privilege, the Court held that venue under newly amended statute was proper notwithstanding that the cause of action had arisen prior to such amendement. Holt, et al vs. Wheeler, 302 S. W. 2d 678 (Tex. CCA-Gal, 1957, writ dismissed)
>
> County Court had jurisdiction to hear case, even though at time the suit was filed, the court's jurisdictional limit was $1,000.00 but amount was increased by the Texas Legislature to $5,000.00 during the pendency of the case. Regal Properties v. Donovitz, 479 S. W. 2d 748 (Tex. CCA-Dal 1972, Ref. N.R.E.)
>
> A psychologist who had been in custody of

> sheriff since 1978 for failure to answer an interrogatory was released by the Texas Supreme Court when Legislature enacted statute providing for the confidentiality of mental health information of individuals, such law becoming effective August 27, 1980. Ex-Parte Abell 613 S. W. 2d 255 (Tex. S. Ct. 1981)

Other States apparently hold that statutes may be enforced restrospectively when the application would not take away or impair vested rights acquired under existing law. The State of Illinois, in construing the effect of a "long arm" statute held ..."the service of process statute did not add to or create new liabilities which were then sought to be retrospectively asserted. What the process law does is merely provide for the effectual assertion of that right, a means of doing so through locals courts. As a remedial procedural statute, it could constitutionally apply to supply effective machiner for the assertion of existing substantive rights..."Bluff Creek Oil Co. v. Green 257 F. 2d (Fifth Cir. 1958)

And this Court, in construing a California process statute held that it was remedial and gave the petitioner a forum to enforce whatever substantive rights she might have against the respondent. McGee v. International Life Ins. Co., 355 U. S. 220 (1957).

Likewise, in a United States District Court in Texas, construing Texas laws, has recently held that retroactive constructions of an amendemnt to the Texas long-arm statute so as to authorize personal jurisdiction over a foreign business entity did not violate the Texas Constitution because the amendment was remedial and procedural and did not affect any vested right of the business entity. Dotson v. Fluor Corporation 492 F. Supp. 313 (D. C. Western District, 1980) The court reasoned that even prior to the amendment the Defendant had no vested right not to be sued in Texas.

So it is in this case that a right to establish paternity was granted by the Texas Legislature in

1975. The Legislature has now expanded the time frame within which to enforce such right and such action may be said to afford a remedy, or to improve and facilitate remedies existing for the enforcement of rights. Pratt v. Story, 530 S. W. 2d 325 (Tex. CCA-Amar. 1975, no writ) Likewise, such action may be said to be remedial in nature and may be given retroactive effect, since the Texas Legislature did not specify that the new law was to govern only illegitimate children born after September 1, 1981.

It is Appellee's position that before this Honorable Court rules on the issue presented by Appellant, the Texas Courts should construe the constitutionality of giving retroactive effect to the four year limitation now in effect for filing paternity suits. The Appellee has, by Motion filed concurrently herewith, asked the Court to so rule.

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Alternatively, Appellee would ask this Court to give retroactive effect to the amended statute and uphold the constitutionality of the one-year limitation from September 1, 1975, through September 1, 1977.

II.

EQUAL PROTECTION

Appellant asserts that the one-year limitation for filing suit for paternity encompassed in Section 13.01, Texas Family Code, discriminated against illegitimate children and relies on, as authority therfor, Gomez v. Perez, 409 U.S. 535, 93 S. Ct. 872 (1973). The reliance is misplaced. EXCEPT FOR Gomez v. Perez, the Texas Family Code would probably not contain Section 13.01. The Constitutional right to bring a paternity suit in Texas was first recognized in 1973 when Gomez v. Perez was decided by the Supreme Court of the United States. Thereinafter, the Texas

Legislature enacted Articles 13.01, et seq. wherein it established a statutory framework for providing illegitimate children the constitutional right of support, predicated on their establishing proof of paternity in the prescribed manner and within a prescribed period of time.

Therefore, the Texas Legislature has removed the "invidious discrimination" by providing illegitimate chilren a method of obtaining support from their natural fathers, and has seemingly removed any possible question of violation of equal protection. Although the specific issue was not before the Texarkana Court of Civil Appeals commented on the issue:

> "It is doubtful that an equal question could arise since the Texas Legislature has sought to bestow upon illegigimate rights which they perhaps never had in the past..." In The Interest of B_____ M_____ N_____ 570 S. W. 2d 493 (Tex. Civ. App.—Texarkana, 1978, No Writ History) quoting from page 499.

Appellant does not suggest to the Court which test should be applied to determine whether Article 13.01 does indeed violate the Equal Protection Clause, that is, the rational scrutiny test; the strict scrutiny test; the rationality scrutiny test or the balancing test. Appellant does suggest that the Supreme Court of the United States has mandated in Mathews v. Lucas that courts must give heightened scrutiny in illegitimacy cases. Our Texas Courts would not agree with the interpretation. Our Texas Courts In The Interest of B____ M____ N____ (supra) has said unequivocally that the Supreme Court of the United States has not applied either the rational basis test or the strict scrutiny test, but has applied, instead, a balancing test. In The Interest of B____ M____ N____ 570 S. W. 2d at 499, and citing Weber v. Aetna Casualty & Surety, 406 U.S. 164, 92 S. Ct. 1400 (1972). This confirmed another Texas Court's

interpretation of the test or basis to be applied, when it stated that the pertinent analytical approach is whether the statute bears a rational relationship to a legitimate government interest. Texas Department of Human Resources v. Chapman, 570 S. W. 2d 46 (Tex. Civ. App.—Dallas 1978, No Writ History) with that Court citing Mathews v. Lucas, 427 U.S. 495, 96 S. Ct. 2755 (1976).

Since the enactment of Section 13.01, which allows illegitimates an avenue for seeking support, the only question left to answer is whether the one-year requirement is reasonably related to a legitimate state interest. The Texas Courts have consistently held that it is.

1. The state has a legitimate interest in preventing the litigation of stale or fradulent claims. Department of Human Resources v. Chapman; supra at 49;

2. The opposing party is entitled to a fair opportunity to defend while the evidence is readily available. In The Interest of B____ M____ N____, supra at 502; Texas Department of Human Resources v. Chapman; supra at 49;

3. The state is interested in enhancing accuracy by placing paternity disputes in a judicial forum within a certain time frame. Lalli v. Lalli, 99 S. Ct. 518, 371 N.E. 2d 481 (1978); Texas Department of Human Resources vs. Chapman; supra at 49; In The Interest of B____ M____ N____, supra at 502.

4. The state has an interest in the continuation of the institutions of family and marriage and should take no action to discourage either institution or to encourage persons to have children out of wedlock.

5. The state has an interest in establishing statutes of limitation which rest upon sound public policy in that they tend to promote the peace and welfare of society, safeguard against fraud and oppression and compel the settlement of claims with a reasonable time after their origin and while the evidence remains fresh in the minds of the witnesses. Alvarado v. Gonzales 552 S. W. 2d 539 (Tex. Civ. App.—Corpus Christi, 1977, No Writ History).

It is clear from a reading of all Texas cases decided since the effective date of Section 13.01 (September, 1975) that it has met the constitutional challenge of equal protection and that the one-year limitation is reasonably related to a legitimate state interest.

And, once a Court (whether the United States Supreme Court or our Texas Courts) has found that a

requirement is substantially related to a legitimate state interest, they may not go further and hypothesize on a possible alternative to the statutory scheme. Lalli v. Lalli, supra at 528. Nor is the Court empowered to invalidate legislative enactments based on its own concept of what reasonable time would be. Texas Department of Human Resources v. Chapman, supra at 49. Alvarado v. Gonzales (supra).

Other States have considered "equal protection" and "due process" attacks upon their respective statutes of limitation as they pertain to paternity cases. These are Iowa, in the case of Ex Rel Krupke v. Witkowski (S. Ct. 1977) 256 N. W. 2d 216, reh. denied; the State of Illinois, in the case of Cessna v. Montgomery (S. Ct. 1976) 344 N. E. 2d 447, reversing its Court of Appeals at 329 N. E. 2d 861, and the State of Colorado, in the case of In The Interest of L. B. et al (S. Ct. 1972) 498 P 2d 1157, reh denied, cert denied 410 U. S. 976, 93 S. Ct. 1947, 36 L. Ed 2d 173.

Each of these cases considered the issues presented in this case. The limitations with which they dealt ranged from two to five years. Not one of these limitations was struck down and each Court upheld its respective Statute of Limitation as not violative of the "equal protection" or "due process" guarantees under the United States Constitution, sustaining their respective enactments as within the constitutional authority of their legislatures to imposes.

The issue of the legislative authority to classify children into distinct groups as legitimiate or illegitimate was discussed and sustained in Cessna v. Montgomery, supra and Krupke v. Witkowski, supra. The justification for this classification was founded upon the fundamental difference of illegitimate children from legitimate children, which is the existence of a parent-child relationship with a particular man in the case of the

legitimate and the total absence of such a relationship in the case of the illegitimate child, at birth.

If "due process" is to be afforted a particular man alleged to be the father of a particular illegitimate child, it follows that such allegations must be proved before the man may be required to support such child. This circumstance does not exist in the case of the legitimate child. Legitimate and illegitimate children are not similarly situated classes. Therein lies the constitutional justification for the Legislature to single them out as a class apart from other children. All of Appellant's arguments in this case, such as the right of the Legislature to classify its citizens into different groups, the right to impose a limitation upon the time within which an action to establish paternity may be commenced with a particular man and the placing of minors on an equal footing with adults, whereby the opportunity to establish paternity and thereafter to obtain support, may be lost to the child because of the fault, indifference, ignorance

or neglect of such others, are all discussed in the above cases at length and without exception were found wanting.

III.

DUE PROCESS

Appellant does not suggest whether she complains of the denial of substantive due process, procedural due process, judicial due process or legislative due process, when attacking the Texas paternity statute, as violative of the due process clause of the Fourteenth Amendement to the Constitution of the United States.

Assuming for a moment that she complains of denial of substantive due process, the criteria is balancing the gain to the public interest against its effect on personal and property rights. With the enactment of Article 13.01, Texas Family Code, and the imposition of the one-year limitation, the

Texas Legislature may well have considered the following factors as gains: a) an assurance that paternity suits would be brought before they are stale or become subject to mistake or fraud; b) the opposing party would have a fair opportunity to defend while the evidence was fresh; c) the accuracy and reliability of evidence would be enhanced if suit were brought within a short time; and d) women would be encouraged to enter into family and marital relationships to gain needed support for their children. It would appear that the social necessity of Section 13.01 is a sufficient justification for the imposition of the one-year limitation period. In The Interest of B____ M____ N____ (supra).

Assuming for a moment that Appellant complains of denial of procedural due process, the criteria is whether the petitioner in the paternity case has

an opportunity to be heard; reasonable opportunity to prepare for hearing; the right of cross-examination and confrontation of witnesses. The guarantee of all such elements are encompassed in Subtitle A of the Texas Family Code where it specifies who may bring suit on behalf of a minor in a suit affecting parent-child relationship.

As our Texas Statute of Limitation now stands, every illegitimate child, even though it must of necessity depend upon others, has an equal opportunity to file an action to establish its parent-child relationship with a particular man.

In simple terms of time it cannot be said with justification that one year is an unreasonable time limit within which to require an action to be filed, though we might all agree more time would have been more reasonable.

Appellant makes much of various reasons why mothers of illegitimate children may be unable to

bring these actions within the prescribed time, and thus cause the child to suffer. While this is possibly so, "due process" does not guarantee to legitimate children perfect adult representatives, nor does it guarantee illegitimate children any better. In this respect all children are treated alike. The United States Constitution and in particular the Fourteenth Amendment, does not guarantee persons against arbitrary acts of persons, but only those of States. What is material is whether the State bars the way. Appellant has not said compliance with the present statute is impossible or requires unreasonable effort. The door of opportunity has been opened by the state on an equal basis to all illegitimate children. If adults who have an interest in the minor do not act, it is not the State that has barred their way. The Statute does not present an impenetrable barrier for those who timely file.

And at least one Court summed its opinion of

the entirety of Chapter 13 of the Texas Family Code:

> ..."Our examination of Chapter 13 of the Texas Family Code, and in particular Section 13.05 (a), leads us to conclude that the Texas Legislature has providently afforded illegitimates generally and appellant specially, both substantive and procedural due process." In The Interest of B____ M____ N____ (supra) page 503.

CONCLUSION

The judgment of the Texas Court of Civil Appeals, Thirteenth Supreme Judicial District, should be affirmed.

Respecfully Submitted,

LOLA L. BONNER
P. O. Drawer 908
Rockport, Texas 78382
512/729-2353
Texas Bar No. 02607000

JOHN H. FLINN
P. O. Box 1112
Sinton, Texas 78387
512/364-4721

ATTORNEYS FOR APPELLEE

APPENDIX

AN ACT

relating to payment, collection, and enforcement of child support; changing the limitation period for bringing paternity suits; amending the Family Code, as amended, by adding Section 14.12 and by amending Section 13.01; amending Section 37, Texas Probate Code, as amended; and amending Section 4, Chapter 831, Acts of the 62nd Legislature, Regular Session, 1971, as amended (Article 1911a, Vernon's Texas Civil Statutes).

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

(SECTION 1 deleted as inapplicable)

SECTION 2. Section 13.01, Family Code, is amended to read as follows:

"Section 13.01. TIME LIMITATION OF SUIT. A suit to establish the parent-child relationship between a child who is not the legitimate child of a

man and the child's natural father by proof of paternity must be brought before the child is four years old, or the suit is barred."

SECTION 3. Section 37, Texas Probate Code, as amended, is amended to read as follows:

"Section 37. PASSAGE OF TITLE UPON INTESTACY AND UNDER A WILL. When a person dies, leaving a lawful will, all of his estate devised or bequeathed by such will, and all powers of appointment granted in such will, shall vest immediately in the devisees or legatees of such estate and the donees of such powers; and all the estate of such person, not devised or bequeathed, shall vest immediately in his heirs at law; subject, however, to the payment of the debts of the testator or intestate, except such as is exempted by law, and subject to the payment of court-ordered child support payments that are delinquent on the date of the person's

death; and whenever a person dies intestate, all of his estate shall vest immediately in his heirs at law, but with the exception aforesaid shall still be liable and subject in their hands to the payment of the debts of the intestate and the delinquent child support payments; but upon the issuance of letters testamentary or of administration upon any such estate, the executor or administrator shall have the right to possession of the estate as it existed at the death of the testator or intestate, with the exception aforesaid; and he shall recover possession of and hold such estate in trust to be disposed of in accordance with the law."

SECTION 4. Section 4, Chapter 831, Acts of the 62nd Legislature, Regular Session, 1971, as amended (Article 1911a, Vernon's Texas Civil Statutes), is amended to read as follows:

"Section 4. Section 5, Article 42.03, Code of Criminal Procedure 1965, as amended, and Section 14.12, Family Code as amended apply when a person is punished by confinement for contempt of court for disobedience of court order to make periodic payments for the support of a child."

SECTION 5. This Act takes effect September 1, 1981. Section 3 of the Act applies to the estates of persons who die on or after the effective date of this Act, and Section 37, Probate Code, as in effect before the effective date of this Act, applies to the estates of persons who die before the effective date of this Act.

SECTION 6. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house

be suspended, and this rule is hereby suspended.

President of the Senate Speaker of the House

I hereby certify that S. B. No. 105 passed the Senate on April 22, 1981, by a viva-voce vote; and that the Senate concurred in House amendements on June 1, 1981, by a viva-voce vote.

Secretary of the Senate

I hereby certify that S. B. No. 105 passed the House, with amendments, on May 30, 1981, by the following vote: Yeas 76, Nays 61, one present not voting.

Chief Clerk of the House

Approved:

_____
Date

_____
Governor